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No. 900

In the
Supreme Court of the United States

October Term, 1963

HIGHWAY EXPRESS LINES, INC. and
MODERN TRANSFER COMPANY, INC.,
Appellants,

v.

JONES MOTOR CO., INC.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT.

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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No.

HIGHWAY EXPRESS LINES, INC. AND MODERN TRANSFER COMPANY, INC.,
Appellants,

v.

JONES MOTOR CO., INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the district court (App., *infra* 1a-12a) is reported at 218 F. Supp. 133 (1963). The district court's opinion on rehearing (App., *infra*, 13a-15a) is reported at 223 F. Supp. 835 (1963). The opinion of the Interstate Commerce Commission (App., *infra*, 16a-26a) is reported at 89 M.C.C. 605 (1962).

JURISDICTION.

This is a civil action under Title 28, United States Code, Section 1336, to set aside an order of the Interstate Commerce Commission. The decision of the district court on rehearing was entered on November 22, 1963 (App., *infra*, 15a). The notice of appeal was filed by Highway Express Lines, Inc. and Modern Transfer Company, Inc., intervening defendants below, on January 10, 1964. Notices of Appeal were also filed by the Pennsylvania Public Utility Commission (P.U.C.) on December 12, 1963 and by the Interstate Commerce Commission (I.C.C.) on January 17, 1964. The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1253. *Interstate Commerce Comm'n v. J-T Transport Co., Inc.*, 368 U.S. 81 (1961); *American Trucking Ass'ns v. United States*, 364 U.S. 1, 17-18 (1960); *Alton R.R. v. United States*, 315 U.S. 15 (1942).

QUESTIONS PRESENTED.

The following questions are presented for determination upon this appeal:

1. Did the district court substitute its own judgment for that of the I.C.C. when it reversed a Commission finding that Jones Motor Co., Inc. ("Jones") was making an unauthoried use of its interstate authority by transporting intrastate shipments between the Philadelphia and Allentown areas in Pennsylvania in nonstop service over routes traversing a portion of New Jersey?

2. Is the I.C.C. required, as a matter of law, to permit interstate routing through New Jersey of Pennsylvania intrastate shipments moving between Philadelphia and Allentown, merely because Jones had commingled therewith bona fide interstate shipments originating from or destined to points without Pennsylvania?

3. Did the district court err in failing to remand the case to the I.C.C. for reconsideration, and possible rehearing, if in fact the I.C.C. made its determination under an erroneous view of the applicable law regarding the significance of commingling?

4. Did the district court err in holding that the only proper procedure for terminating Jones' transportation of intrastate traffic over interstate routings for the purpose of avoiding state regulation is by a proceeding under Section 212(a) (49 U.S.C. § 312(a)), rather than under Section 204(c) (49 U.S.C. § 304(c)), of the Interstate Commerce Act?

STATUTES INVOLVED.

The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding Section 1, provides in pertinent part:

> It is hereby declared to be the national transportation policy of the Congress . . . to cooperate with the several States and the duly authorized officials thereof . . . .

Sections 202(b), 204(c) and 212(a) of the Interstate Commerce Act, 49 Stat. 543, as amended, 49

U.S.C. §§ 302(b), 304(c) and 312(a), provide in pertinent part:

> Sec. 202(b). Nothing in this part shall be construed . . . to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.
>
> * * *
>
> Sec. 204(c). Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith . . . .
>
> * * *
>
> Sec. 212(a) . . . Any . . . certificate . . . may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,*

> That no such certificate . . . shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate . . . found by the Commission to have been violated by such holder . . . .

STATEMENT.

The Commonwealth of Pennsylvania has long subjected intrastate public transportation to comprehensive regulation. Under Sections 201 and 202 of the Act of May 28, 1937, P. L. 1053, 66 *Purdon's Pa. Stat. Ann.* §§ 1121 and 1122, a common carrier by motor vehicle must obtain a certificate of public convenience from the P.U.C. before it may engage in intrastate transportation, and may engage in such transportation only to the extent authorized in such certificate.

In granting or denying applications for a certificate the P.U.C. is guided by standards of public need and service adequacy which are similar to those governing the I.C.C. under Part II of the Interstate Commerce Act, 49 Stat. 543, as amended 49 U.S.C. §§ 301 et seq. Compare *Chemical Tank Lines, Inc. v. Pa. P.U.C.*, 193 Pa. Super. 607, 165 A.2d 668 (1960), aff'd per curiam 406 Pa. 359, 178 A.2d 698 (1962)

(reversing P.U.C. denial of certificate) with *Jones Motor Co., Inc. v. Pa. P.U.C.*, 202 Pa. Super. 134, 195 A.2d 125 (1963) (affirming P.U.C. denial of certificate).

In 1942 Appellee Jones obtained an I.C.C. certificate (R. 107) authorizing service between Philadelphia, Pa. and New York City, including by implication, although not expressly, service between Philadelphia and Clinton, N.J. (App., *infra*, 2a Note 1(a)). In 1950 Jones made application to the P.U.C. for Pennsylvania intrastate authority authorizing service between Philadelphia and Allentown, Pennsylvania.

In 1951, while its P.U.C. application was pending, Jones obtained temporary I.C.C. authority (R. 456) (made permanent in 1953 (R. 110)) authorizing service between Allentown, Pa. and Elizabeth, N.J., including service between Allentown and Clinton, N.J. (App., *infra*, 2a Note 1(b)). By tacking this I.C.C. certificate with its 1942 certificate Jones was entitled to transport interstate traffic between Philadelphia and Allentown by the circuitous Clinton, N.J. routing (see map, *infra*, p. 12). The issue in this case is whether it was also entitled to transport traffic originating and terminating in Pennsylvania (hereafter called "intrastate traffic") between Philadelphia and Allentown by way of Clinton, N.J.

Although it now argues its right to provide service for intrastate traffic between Philadelphia and Allentown, Pa. through Clinton, N.J., Jones nevertheless pressed its 1950 Pennsylvania intrastate application. It was initially successful. *Application of Jones Motor Company, Inc.*, 32 Pa. P.U.C. 364 (1954). How-

ever, the P.U.C. grant of authority was subsequently reversed by the Superior Court of Pennsylvania on the ground that the record showed that the service of existing carriers was adequate. *Modern Transfer Co. v. Pa. P.U.C.*, 179 Pa. Super. 46, 115 A.2d 887 (1955). Having thus failed to secure authority through the P.U.C., Jones nevertheless has continued to use its interstate route through Clinton, N.J. to transport intrastate traffic.

During the period pertinent to this case Jones maintained terminals in Pennsylvania in the Philadelphia and Allentown areas, but no terminals or other facilities were maintained in New Jersey (R. 453-55). On May 1, 2, and 24 and June 28, 1957 Jones moved at least twenty-two shipments of traffic having both an origin and a destination within Pennsylvania ("the twenty-two shipments") using its interstate routing through Clinton, N.J. (R. 400-01). These shipments, for which Jones possessed no state authority (R. 403), were illustrative of a continuing pattern of operation. The vehicles, which were operated nightly, made no pickups, deliveries, or terminal or other business stops in New Jersey. Instead, they proceeded nonstop (except for coffee stops) through New Jersey to provide intrastate service between the two Pennsylvania areas Philadelphia and Allentown (R. 407, 413-14). Transported with the twenty-two shipments on the four days were a total of one hundred eight other shipments moving in bona fide interstate commerce, i.e., having origins or destinations without Pennsylvania (R. 673-74).

On August 5, 1957 the P.U.C. instituted an investigation concerning Jones' actions in handling the

twenty-two shipments. After hearing the P.U.C. ordered Jones to cease and desist from rendering service between points in Pennsylvania, except as authorized by its state certificates. See *Pennsylvania Public Utility Comm'n v. Jones Motor Co., Inc.*, 36 Pa. P.U.C. 261 (1958). That decision was affirmed by the Superior Court of Pennsylvania, sub nom. *Jones Motor Co., Inc. v. Pa. P.U.C.*, 188 Pa. Super. 449, 149 A.2d 491 (1959). The Supreme Court of Pennsylvania refused allocatur. See 190 Pa. Super. xxviii. On certiorari this Court reversed per curiam, 361 U.S. 11 (1959), citing *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959) (in which this Court had held that the I.C.C. has primary jurisdiction to assess the bona fide character of operations under its certificates). The P.U.C.'s petition for reconsideration and clarification was denied by this Court without opinion. 361 U.S. 904 (1959).

Shortly thereafter, on November 20, 1959, the P.U.C., following the *Service Storage* directive, filed with the I.C.C. a complaint, docketed at MC-C-2732, with respect to the twenty-two shipments (R. 91-98). Similar complaints were filed by the P.U.C. against Hudson Transportation Company and Arrow Carrier Corporation and their virtually identical operations (see map, *infra*, p. 12) have now been stopped.[1] After

1. *Pennsylvania Public Utility Comm'n v. Hudson Transportation Co. and Arrow Carrier Corp.*, 83 M.C.C. 729 (1960), aff'd 88 M.C.C. 745 (1962), aff'd sub nom. *Hudson Transportation Co. v. United States*, 219 F. Supp. 43 (D.N.J. 1963) (App., *infra*, 29a-42a), aff'd per curiam sub nom. *Arrow Carrier Corp. v. United States*, 375 U.S. 452 (1964). (No appeal to this Court was taken by Hudson Transportation Co.) The I.C.C. and district court proceedings are cited hereafter as the "*Arrow-Hudson* case", and the appeal in this Court as the "*Arrow* case".

a hearing the examiner in the *Jones* case on September 28, 1961, filed a report and order recommending that the complaint be dismissed on the ground that Jones' operations were bona fide interstate commerce conducted under its I.C.C. certificates (R. 167-77). The I.C.C., Division 1, by order issued June 5, 1962 (R. 687) (App., *infra*, 16a-28a), thereafter reversed the Examiner; held that "the facts in these proceedings are substantially similar to those in the *Hudson* case" (R. 701) (App., *infra*, 23a); and ordered Jones to cease and desist from holding itself out or performing, under certificates issued by the I.C.C., any transportation of traffic having both origin and destination in Pennsylvania. *Pennsylvania Public Utility Comm'n v. Jones Motor Co., Inc.*, 89 M.C.C. 605, 615 (1962). Petitions for reconsideration were denied on December 4, 1962 by Division 1, acting as an Appellate Division (R. 707). The cease and desist order has been stayed pending the outcome of this litigation (R. 63).

Before the I.C.C.'s order became effective Jones filed this action under 28 U.S.C. § 1336 in the United States District Court for the Eastern District of Pennsylvania, seeking a decree permanently enjoining the enforcement of the order. The P.U.C. and the present appellants [2] were permitted to intervene as defendants (R. 54, 55). On June 4, 1963 the district court (Cir-

2. The present appellants, Highway Express Lines, Inc. and Modern Transfer Company, Inc., who were parties to the proceedings before the I.C.C. (R. 150, 153), are motor common carriers holding certificates of public convenience granted by the P.U.C. authorizing the transportation of intrastate traffic in Pennsylvania between the Philadelphia and Allentown areas (R. 430-38, 439-43, 613, 631), and thus suffer direct economic injury by reason of the diversion of traffic approved by the district court.

cuit Judge Ganey dissenting) filed its opinion (App., *infra,* 1a-12a), 218 F. Supp. 133 (1963), reversing the I.C.C. Ten days later the *Arrow-Hudson* case was decided by the District of New Jersey (unanimously) upholding the I.C.C. action against the virtually identical transportation by Arrow and Hudson (App., *infra,* 29a-42a).[3] Upon application of defendants the district court below on July 29, 1963 granted rehearing (R. 993), but on November 21, 1963 filed its opinion and order on rehearing (App., *infra,* 13a-15a), 223 F. Supp. 835 (1963), reaffirming its prior opinion and judgment. Circuit Judge Ganey again dissented.

Notices of appeal to this Court under 28 U.S.C. § 1253 were filed on December 12, 1963 and January 10 and 17, 1964 by the P.U.C. (R. 1059), by the present appellants, Highway Express Lines, Inc. and Modern Transfer Company, Inc. (R. 1064), and by the I.C.C. (R. 1072), respectively.

The Questions Are Substantial.

In *Service Storage & Transfer Co. v. Virginia,* 359 U.S. 171 (1959) this Court held that the I.C.C. has the primary responsibility to determine the scope of certificates issued by it and to decide whether particular operations of certificated carriers are an abuse of their certificates because conducted as a "subter-

3. Circuit Judge McLaughlin, writing for the *Arrow-Hudson* court, added a long footnote (App., *infra,* 40a-42a) purporting to distinguish the *Jones* decision on its facts. We show *infra,* pp. 11-13, that the I.C.C.'s express contrary finding of substantial factual identity (R. 701) (App., *infra,* 23a) (89 M.C.C. 605 at 613) was soundly based.

fuge"[4] in order to escape state regulation. The necessary effect of the views expressed by the majority of the court below will be to render the Commission powerless to deal effectively and forcefully with this important aspect of federal-state relations.

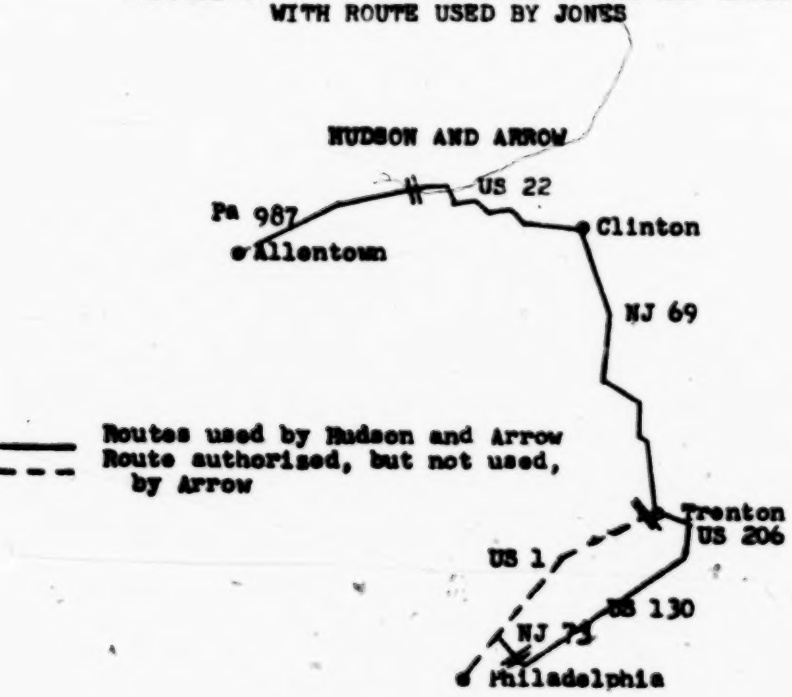
A. The Majority Opinion Seriously Embarrasses the Commission's Efforts to Balance Federal and State Interests by Demanding Adherence to an Impractical Jurisdictional Standard.

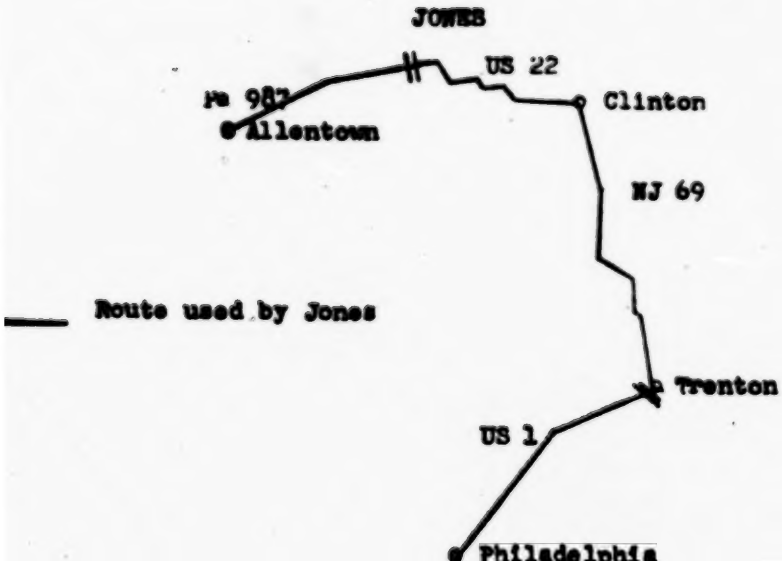
The effect of the decision below is to deny the I.C.C. that scope of administrative discretion which is essential if it is to perform the difficult task of accommodating competing national and state interests in an almost limitless variety of factual settings. A simple comparison of the *Jones* case with the *Arrow* and *Hudson* cases will demonstrate the magnitude of the district court's error in this regard.

The I.C.C., Division 1, held in the *Jones* case (R. 701) (App., *infra*, 23a) that "the facts . . . are substantially similar to those in the [*Arrow*-] *Hudson* case," 89 M.C.C. 605, 613. Examination of the map and table on the following pages confirm this conclusion. Jones, Arrow and Hudson all follow an identical route from Philadelphia to Allentown through Trenton and Clinton. (The slightly longer routing of Hudson and Arrow on the Philadelphia-Trenton leg of this trip obviously has no significance here.)

4. The term "subterfuge" in the present context is a word of art denoting the ultimate fact of unauthorized use of interstate routes for the transportation of intrastate traffic, and does not necessarily imply covert or clandestine conduct. See, e.g., *Eichholz v. Public Service Comm'n*, 306 U.S. 268, 274 (1939); *Hudson Transportation Co. v. United States*, 219 F. Supp. 43, 48 (D.N.J. 1963) (App., *infra*, 37a-38a) aff'd per curiam sub nom. *Arrow Carrier Corp. v. United States*, 375 U.S. 452 (1964).

COMPARISON OF ROUTES USED BY HUDSON AND ARROW WITH ROUTE USED BY JONES





	Arrow	*Hudson*	*Jones*
Actual Route Distance	106 mi.[5]	106 mi.[5]	96 mi.[6]
Direct Pa. Distance	52 mi.[5]	52 mi.[5]	55 mi.[6]
Actual Route Time	210 min.[7]	210 min.[8]	180 min.[6]
Direct Pa. Time	110 min.[5]	110 min.[5]	125 min.[6]
Stops in N.J.	1[7]	None[5]	None[9]
Terminals used on N.J. Route	Phillipsburg, N.J.[7]	None[5]	None[10]
Intrastate traffic commingled with interstate	Yes[11]	Yes[11]	Yes[12]
Logical operating reason for circuitous routing	None	None	None
I.C.C. found subterfuge	Yes	Yes	Yes

5. 83 M.C.C. 729, 731.
6. R. 405-06.
7. 83 M.C.C. 729, 734
8. Id. at 733.
9. R. 407, 413-15.
10. R. 453-55.
11. The Commission's report in *Arrow-Hudson* states: "Hudson's vehicles performing the challenged operations carry both freight originating and terminating at Pennsylvania points and freight which is interchanged with other carriers for through transportation, from, to, or between points without Pennsylvania". 83 M.C.C. 729 at 733. The *Arrow-Hudson* record contained evidence of movements of bona fide interstate traffic over Arrow's routes and thus the Commission expressly held: "the challenged operations by [Arrow] . . . between points in Pennsylvania through points in New Jersey in the transportation of property originating or terminating at points without Pennsylvania is authorized by . . . [its] certificates . . . ." 83 M.C.C. 729 at 740-41.
12. R. 673-77.

The I.C.C. examiner in the *Jones* case concluded from these facts that its operations were legal because the commingling of twenty-two intrastate shipments with one hundred eight bona fide interstate shipments was productive of efficiency and economy. In his view this commingling *alone* provided the logical operating justification for a circuitous interstate routing. A different examiner in the *Arrow* and *Hudson* cases was apparently not impressed by the existence of commingling or Arrow's single stop at its Phillipsburg, N.J. terminal, and concluded that the transportation in question was not bona fide interstate because no logical or normal reason existed for moving the goods by the circuitous interstate routing.

The I.C.C. itself resolved the conflict between its examiners by holding in the *Arrow*, *Hudson* and *Jones* cases that there was no normal or logical reason for the interstate routing of goods having an origin and destination in Pennsylvania, and that accordingly the interstate movement of such goods was a subterfuge to avoid state regulation.

It is the I.C.C.'s duty under the national transportation policy to cooperate with the several states in effectuating Section 202(b) of the Interstate Commerce Act prohibiting interference with the exclusive exercise by each state of the power of regulation of intrastate commerce. Exercising this duty, the I.C.C. recognized that its interstate certificates were never intended to be used for purely intrastate traffic where no other logical operating reason for an interstate routing existed beyond the facility of commingling intrastate and interstate shipments. This adminis-

trative decision was not only within its discretion, it was also the only basis for consistent, intelligent regulation.

The I.C.C. must, of necessity, consider the administrative feasibility of any standard it may adopt.[13] Clearly, commingling is not an adequate standard. In every case (as here and in the *Arrow* and *Hudson* cases) the defendant carrier will be conducting some operations over a particular interstate route in bona fide interstate commerce. Whether that carrier may *also* transport shipments which have no prior or subsequent movement beyond the complaining state can hardly arise without commingling, at least when the illegal traffic is first being developed. Accordingly, the mere fact of commingling is singularly unhelpful in drawing *any* line between state and federal jurisdiction, much less a clear, sharp line (cf. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 506-07 (1940)) which avoids gaps in the state-federal scheme of regulation (cf. *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961))

13. The demands upon the Commission's resources with respect to this type of litigation have not been insubstantial. See, e.g., *Service Trucking Company, Inc.—Petition for Declaratory Order*, 94 M.C.C. 222 (1963); *Pennsylvania Public Utility Comm'n v. Jones Motor Co., Inc.*, 89 M.C.C. 605 (1962) (the instant case); *Pennsylvania Public Utility Comm'n v. National Freight, Inc. et al.*, 89 M.C.C. 605 (1962); *Pennsylvania Public Utility Comm'n v. Hudson Transportation Co.*, 83 M.C.C. 729, on reconsideration 88 M.C.C. 749 (1962); *Arrow Carrier Corp.—Petition for Declaratory Order*, 83 M.C.C. 729, on reconsideration 88 M.C.C. 749 (1962); *Service Storage & Transfer Co., Inc.—Petition for Declaratory Order*, 71 M.C.C. 304 (1957); *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 M.C.C. 175 (1949); *Dixie Freight Lines, Inc., Common Carrier Application*, 24 M.C.C. 780 (1940).

and unseemly and wasteful clashes of jurisdiction. Cf. *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959)

By basing its decision upon such factors as the relationship and circuity of routes, the absence of necessary stops or terminals on the portions of the route outside Pennsylvania, and the absence of any other logical operating reason for the circuity, the I.C.C. adopts a practicable and effective standard. In contrast, the majority of the district court has advanced a standard which answers all *Service* cases by defining away the problem.[14]

The Three Judge Court for the District of New Jersey upheld the administrative discretion and expertise of the Commission as reflected in its decision in the *Arrow-Hudson* cases, 219 F. Supp. 43 (D.N.J. 1963), and this Court has affirmed that decision on motion in *Arrow Carrier Corp. v. U.S.*, 375 U.S. 452 (1964). Circuit Judge Ganey in his dissent in the *Jones* case also upheld the administrative discretion of the I.C.C. to reach its conclusion. The majority of the district court in Pennsylvania has, in contrast, demanded application of its impractical commingling standard, which would replace one based upon the Commission's experience and expertise. That action, unless corrected here, will seriously undermine the

14. The district court majority, in its decision on rehearing, supports its commingling test by examples which seem to assume that Jones has a choice of commingling its intrastate traffic with interstate, or holding the intrastate traffic for an intrastate movement. Since Jones has no intrastate rights (R. 403), this reasoning is as circuitous as the Jones routing.

principles of effective regulation established in the *Arrow-Hudson* case as affirmed by this Court.[15]

Finally, even assuming, *arguendo*, that the degree of commingling is relevant, the majority below is still in error for it should have sent the case back to the Commission for reconsideration. In the proceedings before the I.C.C., the P.U.C. urged (see App., *infra*, 21a) that if "the ratio test of within-Pennsylvania shipments to outside-Pennsylvania shipments is to be determinative of the issue of subterfuge in [this] . . . proceeding" the record be reopened for additional evidence. The Commission denied the P.U.C.'s request for reopening with the observation that the additional evidence would not affect the result (App., *infra* 23a).

In view of the heavy reliance by the majority of the court below upon the commingling factor, the case should certainly have been sent back for evidence as to whether Jones in fact was commingling, or whether in fact on many trips Jones' vehicles were filled

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15. Affording controlling weight to the commingling factor will also make impossible effective state regulation of intrastate commerce by motor carrier. For example, numerous carriers have interstate rights through Pennsylvania. These carriers will be in a position, under the *Jones* decision, to haul traffic regularly between Pittsburgh and Philadelphia, for example, merely by commingling that traffic on the same vehicle with bona fide interstate traffic moving through the state. If the crossing of a state border is necessary to fall within the facts of the *Jones* case, these carriers will merely follow their regular authorized routes across the state and then cross one mile over the Delaware River to Camden, N.J. and return to Philadelphia. The carrier will be traversing an interstate routing authorized by its certificate and will be carrying bona fide interstate shipments on the same vehicle with the traffic having both an origin and a destination in Pennsylvania. The I.C.C. will be unable to prevent such operations under the *Jones* decision, yet the P.U.C. will be unable to act because of the *Service* case, *supra*.

solely with goods having an origin and a destination in Pennsylvania. *Louisville and Nashville R.R. v. Behlmer*, 175 U.S. 648, 675-76 (1900). See also *American Trucking Ass'ns v. United States*, 364 U.S. 1, 13-14 (1960); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952).

B. The Majority's Error Results From a Misapprehension of the Significance of the Examiner's Recommended Report.

This Court has plainly stated that the function of the district court "is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done . . ." and that the district court "cannot substitute its own view concerning what should be done . . . for the Commission's judgment . . . ." *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536 (1946). This "standard is not modified in any way when the Board and its examiner disagree . . . . The findings of the examiner are to be considered . . ." but the significance of his report "depends largely on the importance of credibility in the particular case". *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 496 (1951).

There is no dispute about the facts in this case. Nevertheless, the two district judges below, in sharp contrast to the approach of the dissenting circuit judge, have analyzed the evidence before the Commission, agreed with the examiner, overruled the Commission and have purported to reinstate expressly the examiner's decision (App., *infra*, 9a). In effect, the majority has held that the I.C.C. cannot adopt the ex-

aminer's statement of facts and reject his ultimate conclusion on subterfuge. This review procedure has been expressly outlawed by this Court in *F.C.C. v. Allentown Broadcasting Co.*, 349 U.S. 358, 363-64 (1955) wherein this Court noted that the initial reviewing court had "analyzed the evidence before the Commission . . . , agreed with the Examiner and overruled the Commission," thereby in effect improperly adopting "for examiners of administrative agencies the 'clearly erroneous' rule of the Fed. Rules Civ. Proc., 52(a), applicable to courts."[16] Indeed, since the *Allentown* decision it has been generally understood that "the fact that the Commission, after adopting the statement of facts as reported by the examiners, reached different conclusions does not make its decision arbitrary, capricious or unlawful. The Commission is not required to adopt the recommendations of its examiners." *Eazor Express, Inc. v. United States*, 218 F. Supp. 393, 395 (W.D. Pa. 1963); *W. J. Dillner Transfer Co. v. I.C.C.*, 193 F. Supp. 823, 827-28 (W.D. Pa.), aff'd per curiam, 368 U.S. 6 (1961).

The improper approach of the majority is also strikingly revealed by their comments concerning burden of proof. In *Dillner, supra*, competing carriers petitioned the Commission to determine that Dillner was operating under too broad an interpretation of its certificate. The Commission held against Dillner. On review Dillner argued that the burden of proof concerning the interpretation was upon the Commission (and presumably also upon the originally peti-

16. Rule 52(a) reads in part: Findings of fact [by the court] shall not be set aside unless clearly erroneous . . . ."

tioning carriers). The court held that whatever might be the burden below, "the decision of the Commission carries the presumption of validity . . . . The burden is on Dillner to show . . . . that the decision of the Commission is not based on substantial evidence." 193 F. Supp. at 826.

Here the majority held that the "burden of proof on the subterfuge question is placed upon the P.U.C. [and presumably also upon the Commission], not on Jones" (App., *infra*, 9a), thus clearly indicating that the court either erred in the proper standard on review or improperly embarked upon a *de novo* review of the case.

C. The Restriction of Relief to a Certificate Revocation Proceeding Was Clearly Improper.

The district court majority held (App., *infra*, 9a-10a) that relief from operations conducted over valid interstate routes as a subterfuge to avoid state regulation is available only in a certificate revocation proceeding under Section 212(a) of the Interstate Commerce Act (49 U.S.C. § 312(a)), rather than in a complaint proceeding under Section 204(c) of that Act (49 U.S.C. § 304(c)).[17] That holding is clear error.

This Court in *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959), expressly held that

17. The Solicitor General has suggested in the Government's Motion to Affirm in the *Arrow* case (p. 9), that the *Jones* majority, by emphasizing in its opinion on rehearing its evaluation of the evidence, thereby abandoned its original adverse holding concerning the propriety of the complaint remedy. This suggestion overlooks the majority's express reaffirmation on rehearing (App., *infra*, p. 14a) of *all* "reasons . . . outlined in our prior Opinion . . . ."

where a State believes that an interstate carrier's operation "is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the [Interstate Commerce] Act. Section 204(c) . . . authorizes the filing of a 'complaint in writing to the Commission by any . . . State board . . . [that] any . . . carrier . . .' has abused its certificate." 359 U.S. at 179. The instant appeal involves such a complaint by the State of Pennsylvania.

This Court's recent affirmance of the *Arrow* case is direct authority for the propriety of the complaint remedy. The action there affirmed was the issuance by the full Commission (88 M.C.C. 745 (1962)) of cease and desist orders against Arrow and Hudson after Division 1 had held (83 M.C.C. 729 (1960)) such relief unavailable.

Finally, the majority's reasoning is circular. Section 212(a) is available to "change" a certificate only where there is a showing of willful failure to comply with the Act, the Commission's regulations, or the terms of the existing certificate. But, according to the majority, Jones is not now guilty on any of these counts because its certificates, until "changed" under that section, authorize the interstate routing of the intrastate traffic here in issue. Thus Section 212(a) affords the P.U.C. at best an empty remedy, just as the remedy under Section 204(c) will be empty if this Court fails to reverse the majority's blanket approval of interstate routing of intrastate traffic whenever it is commingled with interstate traffic.

CONCLUSION.

For the foregoing reasons, the questions presented by this appeal are substantial and of public importance. In view of the identity of the relevant facts in this appeal with those of the recently decided *Arrow* case, the Court should exercise its jurisdiction to correct the judgment below.

Respectfully submitted,

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Of Counsel.

March 9, 1964.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 32629.

JONES MOTOR CO., INC.

v.

THE UNITED STATES OF AMERICA

AND

THE INTERSTATE COMMERCE COMMISSION.

OPINION AND ORDER.

(June 4, 1963.)

Before: GANEY, *Circuit Judge*, and WOOD and JOSEPH S. LORD, III, *District Judges*.

By: WOOD, *District Judge*.

Plaintiff, an interstate motor carrier certificated by the Interstate Commerce Commission, but without a cer-

tificate granted by the Pennsylvania Public Utility Commission, covering the specific operation in question, commingled 22 Pennsylvania shipments with 108 other shipments, admittedly interstate in character, and transported these 130 shipments over routes through the State of New Jersey.

On May 1, 2 and 24, and June 28, 1957, these 22 shipments, destined for points in Pennsylvania, were moved from Philadelphia, over U.S. Highway 1 to Trenton, thence over New Jersey Highway 69 to Clinton, thence over U. S. Highway 22 to Allentown, and return movements were over the same routes. The plaintiff operated between Philadelphia and the Allentown, Pennsylvania area over the described routes by tacking its two interstate authorities.[1]

The basic facts presented to the Hearing Examiner were either the subject of a stipulation or were not disputed. Plaintiff is primarily an interstate carrier but also operates its lines between other Pennsylvania points with permits issued by the Pennsylvania Public Utility Commission.

During the period previously referred to, Jones Motor Co., Inc., hereinafter referred to as "Jones," conducted daily operations between Allentown and Philadelphia over the specified route via Clinton, New Jersey. The shipments involved moved over these routes at night and there were no pickups, changing of freight from one vehicle to another, or any business or terminal stops in New Jersey. This was a terminal to terminal operation by Jones with

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1. Jones' Certificates are as follows:

"(a) *Between* Philadelphia, Pa., and New York, N.Y., over U.S. Highway 1, serving all intermediate points, including Trenton, N.J., and off-route points, including 35 miles of Princeton, N.J., and

"(b) *between* Elizabeth, N.J., and Allentown, Pa., via U.S. Highway 22 and New Jersey Highway 28, serving all intermediate points, including Clinton, N.J., on U.S. Highway 22, and serving off-route points in Pennsylvania within 25 miles of Allentown, Pa."

distribution or pickups by Jones via peddle runs to and from intermediate points and points in the area served by it, or Jones connected with an interline carrier where points beyond were involved. Jones also transported over the same route other movements of the same consignors and consignees as are involved in the shipments covered by this action.

The night operation is the only scheduled run between Allentown and Philadelphia, but operations were also conducted during this period, wholly or partially over this route, but not on a scheduled basis, during daytime—pickups and deliveries being made directly by Jones from and to points in New Jersey. The involved routes used by Jones and rates pertaining to all the shipments involved in this action were published in appropriate tariffs filed with the Commission. No effort was made by Jones at any time to conceal its manner of operation over the involved route. Jones' solicitors are stationed at Allentown and Philadelphia and at the time covered by this action traffic was solicited for freight forwarders, steamship companies, export, for traffic having both origins and destinations in Pennsylvania, and for interline carriers with which it had published through routes and rates.

Jones was denied authority by the Pennsylvania Public Utility Commission (P.U.C.) to operate between the Philadelphia and Allentown areas over routes wholly in Pennsylvania on July 21, 1955. On or about August 5, 1957, the P.U.C. initiated a Complaint against Jones. The P.U.C. heard its own Complaint and sustained it by its own decision and issued a Cease and Desist Order against Jones Motor Co., Inc. (Docket C-16813). Jones then appealed through the Pennsylvania Appellate Courts[2] without success.

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2. *Jones Motor Co., Inc. v. Pennsylvania Public Utility Commission*, 188 Pa. Super. 449 (1959); Allocatur refused by the Pennsylvania Supreme Court, 123A, Misc. Docket.

Following this series of events, Jones petitioned the United States Supreme Court for a Writ of Certiorari, which Court granted the Petition and reversed the judgment of the Superior Court of Pennsylvania in *Jones Motor Co., Inc. v. Pennsylvania Public Utility Commission*, 361 U.S. 11 (1959), a *per curiam* opinion which cited *Service Storage and Transfer Co. v. Virginia*, 359 U.S. 171 (1959). The United States Supreme Court denied the P.U.C.'s Petition for Reconsideration and Clarification, wherein it prayed the Court "to file a clarifying opinion or memorandum order expressly stating that the judgment of the Court below was reversed on jurisdictional grounds without regard to the merits of the controversy in the instant cause." 361 U.S. 904 (1959).

Thereafter, the P.U.C. filed a Complaint with the Interstate Commerce Commission docketed by the Commission at MC-C-2732, naming Jones as defendant. This Complaint averred that the operations by Jones in transporting property between certain Pennsylvania points over routes lying partly in New Jersey were beyond the scope of its certificated authority and requested the issuance of a Cease and Desist Order.

Jones filed a Motion to Dismiss the Complaint at MC-C-2732 with the Interstate Commerce Commission (I.C.C.) predicating that Motion upon the doctrine of *res adjudicata* and on the merits. The Motion was denied by the I.C.C. A hearing was held before the Examiner in Philadelphia on February 8, 1961 and Jones renewed its Motion to Dismiss. On September 28, 1961, the Examiner filed his "Corrected Report and Recommended Order," finding that Jones was performing authorized transportation between points in Pennsylvania through points in New Jersey, recommending the dismissal of the Complaint against Jones at MC-C-2732 on the merits, but denying the Motion to Dismiss which was presented formally at the outset of the hearing.

As previously stated, none of the basic facts are in dispute, and they were admitted by Jones in stipulations of fact.

Stated *seriatim* the Examiner concluded that:

1. The longer circuitous routes utilized by Jones in and of themselves were not proof of bad faith or subterfuge,[3] and

2. There existed "logical," "practical" and "feasible" reasons "* * * from the standpoint *of operating efficiency and economy*, for a carrier to include in the same vehicle with 108 shipments, which are admittedly in interstate commerce and moving over routes specified in its interstate certificates, 22 other shipments, over a period of four specified days, which, if defendant (Jones) had held the appropriate authority, might technically have been moved by themselves over a shorter route.

"* * * It would not have been likely for defendant (Jones) to move an average of 5 shipments per day on four different days over this route, by themselves, while moving other shipments the same days in the same area in other vehicles via different routes it had to use for these other shipments, * * *" and

3. The tacking by Jones of its two interstate authorities [4] was proper as no restrictions against opera-

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3. It was stipulated between counsel that the routes traversed by Jones between Philadelphia and Allentown, terminal to terminal, covered a distance of 96.2 miles and the driving time is three hours. Between the same points over U.S. Highway 309, lying wholly within Pennsylvania, the distance would be 55 miles and the driving time two hours, five minutes.

Over the Pennsylvania Turnpike between the same points, wholly within Pennsylvania, the distance would be 74.9 miles and the driving time is one hour, fifty minutes.

4. See note 1, *supra*, for a description of Jones' I.C.C. authorities. The following points are pertinent in this matter: Clinton, N.J. is within 35 miles of Princeton, N.J. and the Pennsylvania points of Easton and Bethlehem were served as intermediate points on U.S. Highway 22. Catasauqua, Pa. and Emmaus, Pa., other points mentioned in the Complaint, are within 25 miles of Allentown; Chester, Pa. is within the Philadelphia commercial zone, and Hatboro, Pa. was served via an unnumbered highway between Hatboro and Philadelphia.

tions between Allentown and Philadelphia were imposed when the certificate of public convenience and necessity giving rise to such authority was granted, and

4. Jones' operations between two points in Pennsylvania, via New Jersey, are physically in interstate commerce, and fall within the purview of the operating authorities contained in Jones' certificates which specifically described the operations authorized therein as transportation in interstate commerce, and

5. No showing had been made that the operations of Jones under its Certificates were not bona fide.

Following this decision the P.U.C. and the Intervenors filed exceptions and supplemental exceptions. Jones replied to all of these exceptions on December 8, 1961. On June 5, 1962, the I.C.C., through Division 1, issued its "Report of the Commission," (see 89 M.C.C. 605), reversing the Examiner, finding that the transportation by Jones constituted a subterfuge and was not authorized by its Certificate and appended a Cease and Desist Order to become effective July 23, 1962. Reconsideration was denied and Division 1, acting as an Appellate Division, by Order of December 4, 1962, denied Jones' Petition and established January 25, 1963 as the effective date of its prior Cease and Desist Order. The "Report of the Commission" and the Order of Division 1, acting as an Appellate Division, consolidated the Complaint against Jones Motor Co., Inc., at MC-C-2732 with another Complaint brought before the I.C.C. by the P.U.C. against National Freight, Inc. and Victory Transportation, Inc., docketed at MC-C-2797, without the proceedings having been consolidated for any purpose whatsoever.

Jones then filed the instant Complaint with this Court seeking a reversal of the Order in question.

We agree with the plaintiff that the Commission's Order is not supported by substantial evidence and must be reversed.

It is interesting to note that the Commission in its Report at p. 612 adopted the Examiner's statement of the facts, and rulings on evidence, such as, his allowance of certain exhibits which proved the interstate character of the other 108 shipments commingled with the challenged 22 shipments from the same consignors destined for Pennsylvania points. Division 1 also agreed with the Examiner's finding that the tacking by Jones of its two interstate authorities was lawful and proper (p. 613).

In the two cases involving National Freight, Inc. and Victory Transportation, Inc., combined with Jones, the Commission noted that Victory obtains 75 percent of its revenue in handling freight originating in the Philadelphia area to other points in Pennsylvania without any authority from the P.U.C. (p. 614), while Jones stated at the hearing on this matter that less than five percent of its business concerns such challenged transportation (N.T. 13-14).

While it is stipulated that all of these shipments were routed through New Jersey, and were therefore on their face interstate[5] shipments, the P.U.C. and the I.C.C. take the position that they were clearly intrastate because they could have been moved over direct routes, thereby never leaving Pennsylvania. *Service Transfer Co.* v. *Virginia*, 359 U.S. 171, 175 (1959).

The only testimony offered to prove bad faith or subterfuge were the statements by officers of the intervenors, Modern Transfer Co. and Highway Express Lines, as to the use of Pennsylvania routes by their companies because they were more logical and practical for *their* operation. Also, there was testimony by a Mr. Duffy who had a conversation with one of Jones' drivers who stated that he had been making the trip for approximately five years, five nights per week over the routes covered by the stipulation mentioned above. An investigator for the

5. 49 U.S.C.A. § 303(10) defines "interstate commerce" as including "commerce * * * between places in the same state through another state * * *" 49 Stat. 544.

P.U.C. gave testimony which the Examiner regarded as merely cumulative to Mr. Duffy's testimony and unrelated to any date mentioned in the Complaint.

Apart from this testimony offered by the P.U.C. to support its position that Jones' routes were circuitous, and somewhat long, no direct evidence of bad faith on the part of Jones was offered by the P.U.C. *Service Transfer Co.* v. *Virginia, supra,* p. 175.[6]

Conversely, Jones was specifically authorized to combine its Certificates in proceedings at MC-F-4955 by these words:

> "Upon consummation of the purchase, Jones Motor Co., Inc., will be entitled to operate under the operating rights granted in No. MC-108161, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate in its name, with duplications eliminated * * *"[7]

Jones also proved that it provided a complete and economical transportation service to its customers by Exhibits 7, 8, 9 and 10, which show that the same consignors are served at the same time on traffic going to other points and that all of this traffic can be picked up at one time. By this nightly terminal to terminal road run Jones can assure its customers morning delivery via local peddle runs which would be handled in the daytime because the businesses then would be open to receive freight (Ex. 12).

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6. The Supreme Court dealt with this identical situation with these words:

> "* * * Aside from the testimony of highway officers as to the actual shipments, none of which is disputed, the Commonwealth's evidence consisted solely of maps substantiating its position that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. However, it offered no direct evidence of bad faith on the part of petitioner in moving its traffic through Bluefield, West Virginia."

7. Modern Transfer Co., Intervenor herein, was a protestant to the acquisition by Jones of this Sub 7 authority (Ex. 5).

The burden of proof on the subterfuge question is placed upon the P.U.C., not on Jones which admittedly is operating under validly combined Certificates. Since the Commission, in its Order bottomed its finding of bad faith solely upon the circuity of routing by Jones after agreeing with the Examiner in most respects, we must reject this unwarranted conclusion and adopt the Examiner's "Corrected Report and Recommended Order."

While it is solely within the province of the Commission to determine that any carrier has *abused* its Certificate,[8] such *abuse* is not shown when a carrier makes an authorized use of his unrestricted certificates which the Commission admits are validly tacked. The Commission's Order really says that while Jones is making an authorized use of its validly tacked certificates such use was *unforeseen* by the Commission when it granted Jones this authority. If the Commission feels that this *unforeseen* use violates the law of Pennsylvania, proper procedures are available to correct this situation. Congress has provided the remedy in 49 U.S.C.A. § 312(a), which states in part as follows:

> "* * * Any such certificate, permit or license may, * * * upon complaint, or on the Commission's own initiative, after notice or hearing be suspended, *changed*, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder. * * *"

In *Castle v. Hayes Freight Lines*, 348 U.S. 61, 65 (1954), the Supreme Court construed the above section 312(a) as follows:

> "* * * If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the

8. *Service Transfer Co. v. Virginia, supra*, at p. 179.

state's interest, either on the Commission's own initiative or on complaint of the state."

This doctrine was reaffirmed by the Supreme Court in *Service Transfer Co. v. Virginia, supra.*

Therefore, the Commission cannot by its Order take away from Jones part of its certificated authority without following the direction of Congress as contained in 49 U.S.C.A. §312(a), which provides the appropriate remedy to protect a state's interests by changing a certificate *in whole or in part.*

GANEY, *Circuit Judge*, dissenting.

A judicial review of the Order of the Interstate Commerce Commission is limited to the inquiry of whether or not there is a rational basis for the conclusions reached and approved by it. *Illinois Central Railroad v. Interstate Commerce Commission*, 206 U.S. 441, 454-455; *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-536.

The facts material to the disposition of the issue here in question are not in dispute. Shipments, approximating some 22 in number, were made during the months of May and June, 1957, by the plaintiff between points in Pennsylvania to certain other points in Pennsylvania. Eleven of these shipments were made from Philadelphia to Allentown, 4 from Easton to Philadelphia and Hatboro, 3 from Bethlehem to Philadelphia, 1 from Chester to Bethlehem, and the others to points from Philadelphia to points within 25 miles of Allentown. To give an example of the shipments, the majority of them moved from Philadelphia over the Tacony-Palmyra Bridge, over U.S. Highway 1 to Trenton, from there over New Jersey Highway 69 to Clinton and then over U.S. Highway 22 to Allentown, which has been designated the Clinton Route. The terminal to terminal distance from Philadelphia to Allentown over

this route is 96.2 miles and the driving time is three hours, whereas the driving time between Philadelphia and Allentown over U.S. Highway 309, within Pennsylvania, is two hours, five minutes, and over the Pennsylvania Turnpike, a distance of 75 miles, the driving time would be one hour, fifty minutes. These shipments were made at night and left Philadelphia traversing the route here indicated, making no stops whatsoever en route, either at Trenton or at Clinton—the terminal at Clinton no longer was in existence, it having been closed more than nine years previously—for any pickups or deliveries. The goods in question were mingled with other goods destined for points beyond Pennsylvania, but after traversing the certificated route of the Commission, the first stop was made in Allentown and the goods destined for delivery there were removed and the balance of the shipment continued on. The record discloses no logical reason or economic purpose for the carrying of the goods across the state line into New Jersey on a certificated route and, accordingly, the Commission reached the conclusion that the transportation was merely subterfuge to avoid compliance with the Pennsylvania Public Utilities Commission regulation which had denied to plaintiff a certificate.

The majority relies heavily on *Service Storage & Transfer Co., Inc. v. Virginia*, 359 U.S. 171. There, the shipment of goods was from Virginia into West Virginia and back again to Virginia for delivery within the State of Virginia. However, there was a principal terminal of the company in Bluefield, West Virginia, where the truck stopped, pickups were made, deliveries were made and the goods, together with other interstate shipments, were returned into Virginia for delivery. Here, there was good reason, as well as economic purpose, in making the transportation, because other goods were picked up in Bluefield and deliveries made therefrom. Full loads were then made up and carried back into Virginia and on into other states, as contrasted with the non-stop performance of the truck, in

this instance, going directly from Philadelphia to Clinton and back into Pennsylvania to Allentown.

While there can be no denial that the concept of interstate commerce embraces a movement between points in one state through another state, the transportation so performed must not be in bad faith to escape the proper jurisdiction of the terminal state. *Eichholz v. Public Service Commission of Missouri*, 306 U.S. 268, 274.

It is submitted the report and order of the Commission represent a valid exercise of its authority and that they are predicated upon adequate evidence and findings and the Commission's actions should be sustained.

ORDER.

AND NOW, this 4th day of June, 1963, IT IS ORDERED by this Court that the Order of the Interstate Commerce Commission requiring Jones Motor Co., Inc., to Cease and Desist from the challenged operations between points in Pennsylvania through points in New Jersey is REVERSED.

OPINION AND ORDER ON REHEARING.

(November 21, 1963.)

Before: J. CULLEN GANEY, *Circuit Judge*, and HAROLD K. WOOD and JOSEPH S. LORD, III, *District Judges*.

By: WOOD, *District Judge*.

On June 4, 1963, we reversed the Order of the Interstate Commerce Commission which had found the plaintiff motor carrier guilty of a subterfuge to avoid the jurisdiction of the Commonwealth of Pennsylvania.

Thereafter, we granted the defendants' petitions for rehearing and reconsideration on July 23, 1963. This rehearing was held on October 11, 1963.

The basis of our prior opinion and order was that the record failed to disclose substantial evidence to support the Commission's finding of subterfuge on the part of Jones.

When Jones carries shipments from states other than Pennsylvania to Allentown it must use its certificated route through Philadelphia and Clinton, New Jersey, to Allentown. It can use none other because this is the only authority it has from the Interstate Commerce Commission. This route is 96.2 miles long and the driving time is 3 hours, whereas the route from Philadelphia to Allentown via Route 309 is 55 miles and requires 2 hours and 5 minutes driving time. The only remaining route wholly within Pennsylvania is the Pennsylvania Turnpike, the distance being 74.9 miles and the driving time is 1 hour and 50 minutes.[1]

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1. In *Service Transfer Co. v. Virginia*, 359 U.S. 171, 175 (1959), the circuitous routes utilized by the carrier were sometimes *twice* the shortest possible intrastate route. The driving times are not mentioned and apparently were not important.

It seems to be logical and normal for Jones to carry the comparatively few Philadelphia to Allentown shipments, shown on the record,[2] on its 96 mile trip rather than to delay these few shipments for several days until a larger quantity could be dispatched over a route wholly within Pennsylvania.

Were Jones to split its operation to carry the questioned traffic on one truck via Route 309[3] which is 55 miles long and the remaining shipments over its 96 mile interstate route it would result in a combined total of 151 truck miles. This hardly seems practical and efficient from the standpoint of operating economy when one truck traveling 96 truck miles could carry all the shipments in one movement. Any increased fuel expense incurred by Jones in utilizing its interstate route would be offset by a saving in fewer drivers and trucks.

Since these 22 shipments are by definition "interstate"[4] and further, since 96 truck miles are preferable to 151 truck miles, we find no evidence of bad faith in the record of this proceeding.

For these reasons and those outlined in our prior Opinion, we dismiss the defendants' petitions for reconsideration.

J. CULLEN GANEY, *Circuit Judge*, dissenting.

I dissent.

The distance between Philadelphia and Allentown, on appellant's certificated route—its authority from the Interstate Commerce Commission—is 96.2 miles. The intrastate distance between Allentown and Philadelphia on Route 309, an excellent highway, is 55 miles, a saving of some 41 miles if the appellant had the approval of the Pennsylvania Public Utility Commission. It is indisputable that the run from

2. 22 in number.

3. Assuming that Jones had Pennsylvania authority.

4. *Service Transfer Co. v. Virginia, supra,* Footnote 1.

Philadelphia to Trenton and back to Philadelphia is a dry run in that no stops were made en route to Trenton nor at Trenton itself nor from Trenton to Philadelphia. Accordingly, this differs radically from *Service Storage and Transfer Co. v. Virginia,* 359 U.S. 171, where Bluefield, West Virginia, which would correspond to Trenton in the instant case, was a terminal point on the certificated route, where the truck stopped, goods were delivered from it and other goods taken aboard, which gave reason and substance for going there, all absent in the instant case. Here, the truck may well have been taken to Clinton, New Jersey, or the New Jersey side of the Tacony-Palmyra Bridge, both on the appellant's certificated route, and a much shorter distance, turned around and gone on to Allentown and there would have been as much substance to the trip as going many miles deeper into New Jersey to Trenton.

Conceding, as is obvious, that 49 U.S.C.A. § 303(10) defines "interstate commerce" as including "commerce . . . between places in the same State through another State . . . .", it must likewise be conceded that this action must not be construed in a vacuum, but that inherent in the statute is the bona fides of the transaction or commerce and that merely a dry run traversing a portion of a certificated route without rhyme or reason cannot make the "commerce" interstate and thus enable it to avoid interstate [sic] regulation.

I can see no other reason for this bizarre performance other than as a subterfuge to avoid compliance with the Public Service Commission of Pennsylvania, and I reiterate the reasons set out in my original dissent.

ORDER.*

And Now, this 21st day of November, 1963, the defendants' petitions for reconsideration are dismissed and our Order of June 4, 1963 is affirmed.

[* Filed November 22, 1963.]

APPENDIX B.

Service Date
June 14, 1962

INTERSTATE COMMERCE COMMISSION

No. MC-C-2732 [1].

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

JONES MOTOR CO., INC.

Decided June 5, 1962.

REPORT OF THE COMMISSION.*

DIVISION 1, COMMISSIONERS MCPHERSON, BUSH, AND TUCKER

BUSH, COMMISSIONER:

These proceedings were heard on separate records and were the subject of separate orders by the examiner; their issues are similar, however, and they will be disposed of here in a single report. In No. MC-C-2732 exceptions to the order recommended by the examiner were filed by the Pennsylvania Public Utility Commission, hereinafter sometimes called P.U.C. and jointly by Highway Express Lines, Inc., and Modern Transfer Company, hereinafter called High-

1. This report also embraces No. MC-C-2797, Pennsylvania Public Utility Commission v. National Freight, Inc., and Victory Transportation, Inc.

* Note: Portions of Report applicable only to National and Victory have been omitted from this Appendix B.

way Express and Modern, and defendant replied. In No. MC-C-2797, separate exceptions to the order recommended by the examiner were filed by P.U.C. and by Motor Freight Express, hereinafter called Motor Express, and defendants replied. Our conclusions differ from those recommended. Points herein referred to are in Pennsylvania except where otherwise noted.

In No. MC-C-2732, by complaint filed November 20, 1959, and in No. MC-C-2797, by complaint filed February 26, 1960, P.U.C. alleges in essence that Jones Motor Co., Inc., and National Freight, Inc., and Victory Transportation, Inc., jointly, (1) are motor common carriers holding certain authorities issued by the Interstate Commerce Commission, and as such are subject to the provisions of the Interstate Commerce Act, and (2) have transported by subterfuge property by motor vehicle between certain points in Pennsylvania, over routes through New Jersey in the case of Jones, and over routes through New Jersey and Delaware in the case of National and Victory, without first having obtained appropriate certificates of public convenience and necessity from the Interstate Commerce Commission, as required by sections 203(c) and 206(1) of the Interstate Commerce Act, or from P.U.C., as required by sections 202(b) and (c) of the Public Utility Law of Pennsylvania. Complainant prays that the Commission issue an order in each proceeding requiring defendants to cease and desist from the alleged violations. Answer to the complaints were filed by defendants. Highway Express and Modern were permitted to intervene in support of the complaint in No. MC-C-2732, and Motor Express and The Pennsylvania Railroad Company were permitted to intervene in support of the complaint in No. MC-C-2797.

The material facts are not in dispute. The complaint in the title proceeding asserts and Jones admits, that on May 1, 2, and 24, and June 28, 1957, approximately 22 shipments were transported by Jones between points in Pennsylvania as follows: 11 from Philadelphia to Allentown and

3 points within 25 miles of Allentown, 4 from Easton to Philadelphia and Hatboro, 3 from Bethlehem to Philadelphia, 1 from Chester to Bethlehem, single shipments from Emmaus and Catasauqua to Philadelphia, and 1 from Oaks was transported by defendant from Philadelphia to Bethlehem. The shipments moved to some extent over highways in New Jersey. Shipments from Philadelphia moved over U.S. Highway 1 to Trenton, N.J., thence over New Jersey Highway 69 to Clinton, N.J., thence over U.S. Highway 22 to Allentown, hereinafter called the Clinton route; and movements in the reverse direction were over the same route. The terminal-to-terminal distance between Philadelphia and Allentown over the route traversed by Jones is 96.2 miles, and driving time was 3 hours. Between the same points over U.S. Highway 309 within Pennsylvania, the distance is 55 miles, and the driving time, 2 hours and 5 minutes, and over the Pennsylvania Turnpike the distance is 75 miles with a driving time of 1 hour and 50 minutes. The challenged shipments moved on a daily night schedule operated by Jones between its Philadelphia and Allentown terminals over the Clinton route; and they were commingled with other freight which moved to, from, or between points without Pennsylvania. No stops for pickup and deliveries were made on the operations between the Philadelphia and Allentown terminals; peddle runs provided service from or to points served by Jones in the Allentown area, and from Chester and Oaks, and to Hatboro.

* * *

Modern and Highway Express each hold P.U.C. intrastate authority to perform the transportation of general commodities between Philadelphia, and points in the Allentown area. They utilize U.S. Highway 309 which is the most direct route between Philadelphia and Allentown. Their vehicles average approximately 2 hours in driving time between Philadelphia and Allentown.

* * *

PERTINENT AUTHORITIES OF DEFENDANTS—None of the defendants hold intrastate authority to operate within Pennsylvania. Jones, defendant in No. MC-C-2732, is a motor common carrier holding certificates from this Commission in Nos. MC-4963 and MC-4963 (Sub-No. 7). The former, as pertinent, authorizes the transportation of general commodities, with exceptions, between Philadelphia and New York, N.Y., over U.S. Highway 1, serving all intermediate points, and points within 35 miles of Princeton, N.J., as off-route points. The Sub-No. 7 certificate was issued upon the purchase by Jones of the operating rights of another carrier, and authorizes the transportation of general commodities, with exceptions, between Allentown and Elizabeth, N.J., over a regular route, from Allentown over U.S. Highway 22 to junction New Jersey Highway 28 near Raritan, N.J., thence over New Jersey Highway 28 to Elizabeth, and return over the same route. Service is authorized at all intermediate points on this route, including Clinton, and all off-route points within 25 miles of Allentown. The foregoing authorities have been tacked at Clinton, a service point within 35 miles of Princeton and Common to both routes, to provide a basis for service by Jones between Philadelphia, on the one hand, and on the other, points in the Allentown 25-mile area over the previously-described Clinton route.

Jones maintains two solicitors in Philadelphia and the same number in Allentown who each solicit all available traffic. It admittedly operates nightly schedules over the Clinton route to transport shipments between Philadelphia and Allentown because it is certain of its authority to operate over such route. It had previously filed with P.U.C. an application for authority to operate between Philadelphia and Allentown over highways entirely within Pennsylvania, but its application was denied.

• • •

The examiner recommended that both proceedings be dismissed. * * * The examiner found * * * in the title proceeding, that defendants lawfully were performing transportation authorized by their respective certificates.

EXCEPTIONS AND REPLIES—In separately filed exceptions in each proceeding, P.U.C. and the interveners contend, in essence, that the examiner erred (1) in finding that the challenged transportation is bona fide, logical, and lawfully authorized by the defendants' operating authorities; (2) in ignoring the tests of subterfuge as laid down by the courts; (3) in concluding that *Pennsylvania Public Utiliity Comm. v. Hudson Transp. Co.*, 83 M.C.C. 729, hereinafter called the *Hudson* case, does not form a basis for a finding of subterfuge in the instant proceeding; and (4) in dismissing the complaints. They argue that if the examiner's findings are approved, regulation by Pennsylvania over intrastate traffic would become chaotic because many carriers by tacking to form interstate routes would be able to provide competition with Pennsylvania-authorized carriers for available traffic moving between points in Pennsylvania without having filed applications for appropriate authority with either P.U.C. or this Commission and without having shown a public need for additional service. More specifically, in No. MC-C-2732, they argue that the examiner uses tenuous and illogical factual distinctions to avoid the implications of the *Hudson* case; that the entire pattern of Jones' operations between Philadelphia and points in the Allentown area involves the substantial transportation on a regular nightly basis of shipments having origin and destination within Pennsylvania rather than, as reasoned by the examiner, the commingling of a small number of incidental shipments with a large number of shipments which moved from or to points without Pennsylvania; that the specification of 22 shipments in the complaint was intended to relate to an unlawful course of action by Jones, and no attempt was made to establish the percentage relationship of within

Pennsylvania shipments to shipments outside Pennsylvania handled by Jones; and that the challenged transportation is performed as a subterfuge to evade State regulation.

• • •

P.U.C. also renews contentions made at the hearing and on brief in No. MC-C-2732 that the examiner erred in failing to correct adverse rulings pertaining to admission of certain exhibits introduced by defendant of abstracts of its shipments purporting to show that the considered within-Pennsylvania movement was small in volume when contrasted with the claimed large volume of shipments to and from points without Pennsylvania, all carried in the same truckload. P.U.C., and intervener also contend in both proceedings that the examiner erred, (1) in failing to admit into evidence certain oral testimony by adverse witnesses, and (2) in restricting their cross-examination. Included in the respective exceptions of P.U.C., are requests for reopening of the records or for further hearing, so as to admit claimed erroneously excluded evidence and new evidence in No. MC-C-2797, and to develop properly the record in No. MC-C-2732, in the event that the ratio test of within-Pennsylvania shipments to outside-Pennsylvania shipments is to be determinative of the issue of subterfuge in that proceeding.

In their replies, defendants take direct issue with the matters raised on exceptions. They argue, generally, that the challenged tacking of their operating authority is lawful under the doctrine set forth in *Aetna Freight Lines, Inc., Interpretation of Certificates*, 48 M.C.C. 610; that the findings of the Commission, division 1, in the *Hudson* case, do not provide governing law for the disposition of these proceedings because petitions for reconsideration [4] have

4. Since the filing of replies herein, the entire Commission on March 19, 1962 has issued its report on reconsideration in the *Hudson* case. On May 1, 1962, the United States District Court for the district of New Jersey entered a temporary restraining order staying the effective date of May 7, 1962, until such time as the Three Judge court enters judgment in the case.

been filed in that proceeding; that the Commission has found, and courts have held, consistently, that transportation between points in the same State over routes through another State are in interstate commerce, citing *Dixie Freight Lines, Inc., Common Carrier Application*, 24 M.C.C. 780, and *Roundtree v. Terrell*, 22 F. Sup. 29; that the challenged transportation has been performed openly and lawfully without subterfuge; and that complainant and interveners have failed to prove subterfuge on the part of defendants.

Defendants refer to *Service Storage and Transfer Co., Inc.,—Declaratory Order*, 71 M.C.C. 304, and *Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U.S. 171, as authority for the proposition that although their routes are circuitous and the driving time thereover unnecessarily long, without direct evidence of bad faith, these factors cannot amount to subterfuge. Defendant in the title proceeding also argues that the decisions rendered by the Supreme Court in the *Service* case, *supra*, and in *Jones Motor Co., Inc. v. Pennsylvania Utility Commission*, 361 U.S. 11, were not merely jurisdictional determinations as stated by division 1 in the *Hudson* case, but constituted decisions of the basic issues presented therein which govern the issues in the proceeding against it; and, in this connection, it renews its motion to dismiss that complaint on the doctrine of *res adjudicata*.

A careful review of the record, the recommendations, the exceptions, and the replies thereto discloses the statements of facts in the examiner's reports to be correct and we adopt them as our own.

* * *

With respect to the challenged exhibits and the other evidentiary issues, we are of the opinion that the examiner's rulings are proper, for the most part, and within his discretion. The shipments shown on the exhibits were transported by Jones and were supported by shipping documents which were made available to the parties. In

our opinion, the objections raised are really directed against the weight to be accorded the exhibits as evidence rather than to their admissibility. The other matters concern mostly opinion testimony and may have been technically admissible, but, in no instance, was their exclusion materially prejudicial to complainant and interveners, and, in our opinion, if all the excluded testimony has been admitted and considered, it would have had no appreciable bearing on the outcome of the instant proceedings. Moreover, many of the facts which the excluded testimony was designed to prove were evidenced by stipulation of the parties or by other witnesses. It is doubtful that any of the new evidence which P.U.C. proposes to present would have any bearing on the outcome of the proceeding, and in view of the long pendency of these proceedings and our conclusions, the requests of P.U.C. for reopening the records are denied.

DISCUSSION AND CONCLUSIONS.—Several preliminary matters require discussion before the other issues.

* * *

None of the parties seriously questions the lawfulness of the tacking by Jones of its separate authorities in order to perform the transportation challenged in No. MC-C-2732, and having disposed of the issue concerning the lawfulness of the tacking by National and Victory to perform the transportation challenged in No. MC-C-2797, we may now direct our attention to the disposition of the other matters before us.

The facts in these proceedings are substantially similar to those in the *Hudson* case. There, defendants tacked segments of certain operating authorities to perform transportation by way of routes through New Jersey to some extent between Philadelphia, on the one hand, and, on the other, points in Pennsylvania within 40 miles of Stroudsburg, including Allentown, Scranton, Wilkes Barre, West Pittston, Shamokin, Catasauqua, Muncy, and others. No

stops were made at points in New Jersey to pick up and deliver shipments, the interstate routes utilized were circuitous when compared to the direct Pennsylvania intrastate routes, and no logical reason appeared for the tacking by the defendants there, and the use of the routes thereby formed, other than the fact that defendants there were without intrastate authority to transport traffic involved. In its report on reconsideration in the *Hudson* case the entire Commision affirmed the findings of division 1 that the defendants are engaged in the transportation of intrastate freight between points in Pennsylvania through points in New Jersey as a subterfuge to evade the laws of Pennsylvania, and, in addition it found that such transportation by defendants, inasmuch as it is conducted as a subterfuge to evade the laws of Pennsylvania, is not authorized by defendants' respective certificates. An order was entered in the *Hudson* case requiring each defendant therein to cease and desist from performing under certificates issued by this Commission all operations found to be intrastate in character.

Upon consideration of all the facts of record, we are convinced that the challenged operations subject to regulations, although ostensibly authorized by their certificates, are, except for their routing, actually in intrastate commerce, and that they are conducted as a subterfuge to evade the laws of Pennsylvania. Jones operates terminals in Philadelphia and Allentown, and its main activity is the movement of less-than-truckload freight. In order to gather the shipments and, by combining them, make up a full truckload, it operates "peddler runs" from its Philadelphia and Allentown terminals which serve as pickups and deliveries of freight in the Philadelphia and Allentown area. All of the freight is directed through the Allentown and Philadelphia terminals and is transported on daily nightly schedules without stops to pick up and deliver town. Jones' traffic officer admitted that the Clinton route which is substantially circuitous when compared with the

direct intrastate routes between Philadelphia and Allentown. Jones' traffic officer admitted that the Clinton route is utilized because "we know we are authorized." He also stated that Jones advertises to shippers "as to service we perform in our interstate authorities." It also, admittedly, publishes the same rates as intrastate carriers and is competitive with such carriers operating between the considered points.

* * *

Considering all the facts, we are satisfied that the following statement by division 1 in its report in the *Hudson* case, page 740, applies on all fours to the respective above-described operations of the defendants herein:

> No logical reason appears for the present routing of the intrastate freight other than the fact that defendants are without intrastate authority to transport it; and from the record, it fairly appears that the only reason for such routing is so that Hudson and Arrow may participate in the intrastate traffic purportedly under rights arising from certificates issued by this Commission.

We therefore conclude that Jones, and National and Victory, jointly, have, by their engaging in the challenged transportation, attempted in bad faith to convert to interstate traffic, traffic which, but for routing, is actually in intrastate commerce subject to the laws of Pennsylvania.

The contentions raised by defendants not discussed herein, were specifically disposed of in the *Hudson* case, *supra*, and require no further discussion herein. Defendants' motion in No. MC-C-2732 to dismiss that proceeding on the doctrine of *res adjudicata* is overruled.

In Nos. MC-C-2732 and MC-C-2797, we find that the challenged operations by the respective defendants between the points in Pennsylvania involved, through points in New

Jersey in the case of the former, and through points in New Jersey and Delaware, in the case of the latter, in the transportation of property subject to economic regulation both originating and terminating at points in Pennsylvania are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania, and are not authorized by their respective certificates issued by this Commission; and that an order should be entered requiring each defendant to cease and desist, and hereafter abtain from holding themselves out or performing under certificates issued by this Commission, all operations found herein to be intrastate in character.

• • •

An appropriate order will be entered.

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 5th day of June, A. D. 1962.

No. MC-C-2732

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

JONES MOTOR CO., INC.

No. MC-C-2797

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

NATIONAL FREIGHT, INC., AND VICTORY TRANSPORTATION, INC.

It appearing, That the above-entitled proceedings, being at issue upon complaints and answers on file, and full investigation of the matters involved having been made;

And it further appearing, That the said division, on the date hereof, has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That defendants be, and they are hereby, notified and required within 30 days from the date this

order becomes effective pursuant to the provisions of section 17(5) of the Interstate Commerce Act, to cease and desist, and hereafter abstain from holding themselves out or performing under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character;

It is further ordered, That the complaint in No. MC-C-2797 to the extent that the challenged operations are not subject to economic regulation by this Commission, be, and it is hereby, dismissed.

And it is further ordered, That this order shall become effective on July 23, 1962.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX C.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Civil Action No. 362-62.

HUDSON TRANSPORTATION COMPANY,
Plaintiff,

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Defendants.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Civil Action No. 306-62.

ARROW CARRIER CORPORATION,
Plaintiff,

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Defendants.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

OPINION.

(June 14, 1963.)

Before: McLAUGHLIN, *Circuit Judge*, and WORTENDYKE and LANE, *District Judges*.

By McLAUGHLIN, *Circuit Judge*.

These are separate suits by unrelated parties brought under 28 U.S.C. § 1336 to set aside orders of the Interstate Commerce Commission. Because they involved similar issues the proceedings before the Interstate Commerce Commission were heard on a consolidated record, with the Examiner filing a single report and recommended order regarding them. They were reconsidered by Division One of the Interstate Commerce Commission which filed a consolidated report thereon. Thereafter the Commission reviewed the proceedings and disposed of them in one report and order. The cases were consolidated for hearing in this court and heard March 8, 1963.

The causes came to the Interstate Commerce Commission (I.C.C.) first, through the filing of petitions by both present plaintiffs asking for declaratory orders that they are authorized by the I.C.C., inter alia, to conduct operations between Pennsylvania origin points and Pennsylvania destination points over their certificated interstate routes traversing New Jersey and second, through complaints filed by the Pennsylvania Public Utility Commission (P.U.C.) charging that the plaintiffs are motor carriers holding certain authorities issued by the I.C.C. and subject to the provisions of the I.C.C. Act; that they have transported property by motor vehicle between certain points in Pennsylvania over routes through points in New Jersey, without first having obtained appropriate certificates of public convenience and necessity from the I.C.C. as required by Sections 203(c) and 206(a)(1) of the I.C.C.

Act or having obtained a certificate from P.U.C. as required by Sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania.

Following the hearing before the Examiner the latter filed his recommended report and order. In that he found that the challenged operations of the present plaintiffs between points in Pennsylvania through points in New Jersey, in the transportation of property both originating and terminating at points within Pennsylvania were not authorized by their certificates, that they were engaged in that traffic without proper authority and in violation of the I.C.C. Act, § 206(a)(1) and that an order should be entered requiring each defendant to cease and desist from all such operations. It was also recommended that present plaintiffs' petitions above mentioned be denied.

Division One after reconsideration of the issues concluded that the disputed operations of Hudson and Arrow were, but for their routing, actually intrastate commerce and holding that the carriers' petitions to the extent they sought an interpretation to the contrary, should be denied. There was the further holding that said operations were authorized by the carriers' certificates and that the complaints in so far as they embraced those activities be dismissed. The Division went on to say:

> "No logical reason appears for the present routing of the intrastate freight other than the fact that defendants are without intrastate authority to transport it; and from the record, it fairly appears that the only reason for such routing is so that Hudson and Arrow may participate in intrastate traffic purportedly under rights arising from certificates issued by this Commission. All things considered, we are convinced that both Hudson and Arrow have, in their respective operations hereinabove described, by which they have transported freight moving between Pennsylvania points without a prior or subsequent interstate move-

ment, attempted in bad faith to convert, to interstate traffic, traffic which, but for routing, is actually in intrastate commerce subject to the laws of Pennsylvania.

"We do not believe, however, that an order directed against such intrastate transportation would be appropriate in these proceedings, inasmuch as we have no jurisdiction over intrastate commerce and the physical operations involved, as actually conducted, violate no provision of the Interstate Commerce Act."

Though the Division concluded, as stated in the paragraph just above, that an order directed against the particular type of transportation would not be appropriate in the proceedings and so to that extent should be dismissed, it did specifically find that:

"(2) that the challenged operations by defendants between the points in Pennsylvania involved, through points in New Jersey, in the transportation of property both originating and terminating at points within Pennsylvania are, but for their routing, in intrastate Commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania; * * *."

On reconsideration, the Commission stated in its report:

"We are convinced that in the absence of regulation by the Commonwealth of Pennsylvania both defendants would use the normal and direct routes between the Pennsylvania points they hold themselves out to serve. We are satisfied, as were division 1 and the examiner, that in the transportation of freight moving between Pennsylvania points without a prior or subsequent interstate movement, the defendants have attempted in bad faith to convert what is essentially intrastate commerce into interstate commerce and thus to defeat the regulatory laws and policies of the Com-

monwealth of Pennsylvania. In other words, this is a case of subterfuge, pure and simple."

and held:

"On reconsideration in Nos. MC-C-2671 and MC-C-2696, we find (1) that the described operations by defendants between points in Pennsylvania through points in New Jersey in the transportation of property originating or terminating at points without Pennsylvania are authorized by the respective defendants' certificates; and (2) that the described operations by defendants between the involved points in Pennsylvania, through points in New Jersey, which transportation of property originates and terminates within Pennsylvania, are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania and they are not authorized by their respective certificates; and (3) that an order should be entered requiring each defendant to cease and desist, and hereafter abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character.

"In Nos. MC-113933, MC-71536, and MC-71536, subnumbers 1, 2 and 3, we find on reconsideration that the matters to which the petitions are directed have been disposed of in the findings above and the petitions thus should be denied.

"An appropriate order will be entered."

The facts are uncomplicated and quite similar in both cases.

Hudson has an I.C.C. certificate which allows it to operate between Philadelphia and Warren County, New Jersey. It has another certificate which permits it to operate between that New Jersey area and Easton, Allentown, Scranton, and the Stroudsburg area. By tacking the two

together it has been operating a freight route between Philadelphia and Easton, Allentown, Scranton and other Pennsylvania points in that latter section. Hudson does not have Pennsylvania Public Utility Commission authority for a freight route between Philadelphia and the stated Pennsylvania territory. It is argued most capably on behalf of Hudson that since it has the lawful I.C.C. certificates and since the practice of tacking is permitted, that it should be allowed to continue to so function.

Substantial evidence was presented at the hearing from which either by admission, directly or by proper inference, it could have been justifiably concluded that Hudson's routes between Philadelphia and Easton, Allentown, Scranton and other related Pennsylvania destinations were circuitous, that no stops were made between those points to pick up or deliver freight, that the mileage and time so consumed were both far greater than the distance and time to make such run by directly proceeding between Philadelphia and those places. There is some attempt at fringe contradiction of this but our own examination of the record satisfies us that at best this is quibbling; it actually ignores the supporting testimony and stresses that which is more favorable to Hudson. The Hudson Vice President in charge of traffic and sales was a witness. On direct examination he testified that his company's route above mentioned between Philadelphia and Scranton was the most direct route. He said the route was through New Jersey. He said that using "these routes" is not subterfuge "because this is the only way Hudson Transportation can travel, via these routes because of our interstate authority, in MC-113993". With reference to those routes he said: "We generally operate around the clock, 24 hours a day, seven days a week." He admitted his company advertised in the Philadelphia Telephone Directory. "Direct service to points in Pennsylvania;" that it advertises in the Allentown, Scranton and Wilkes Barre telephone directories "service in Pennsylvania,"

that it uses four full time solicitors for business who carry with them a point list of the points Hudson can serve or that it alleges it can service in Pennsylvania.

The witness was asked by the Examiner:

"If there was no regulation from the I.C.C. or Pennsylvania Public Utility Commission, what route would you take from Philadelphia to Scranton, *the shortest route, a practical route?*"

The witness answered:

"*In all probability I would take the turnpike,*" which he said was in Pennsylvania. (Emphasis supplied.)

With respect to the route Hudson takes between Philadelphia and Scranton, the witness was asked:

"Because you have the authority to go as you allege by way of New Jersey, that is the reason you take it that way?"

The answer was "Yes."

Asked, "So the only difference between what becomes interstate and intrastate is your determination to take it by way of New Jersey?" The witness answered, "It is not my determination. It is the only way we can get to Philadelphia via the gateway of Warren County."

The witness agreed with the testimony of Hudson's Executive Vice President before the Pennsylvania Public Utilities Commission that there were no stops in all Hudson's transportation between Allentown and Scranton and Philadelphia, including no stops made in New Jersey, also that there were no drop-offs in New Jersey, en route, or any pickups en route, in any of the instances involved in the complaints and that the transportation was performed at night, which the witness stated was the normal trucking company time for operation between terminals.

The evidence in the Arrow record is along the same lines. And in this instance also, the carrier position is presented with the utmost of lawyerlike skill. Some objection is raised in Arrow's complaint re dissimilarity of issues with the Hudson matter but before the Examiner when the cases were consolidated, Arrow agreed that "The issues are the same, and therefore I see no reason for a continuance, or for a separation of the issues." The record shows plainly that evidence common to both suits was available for use in the two suits.

Here again we have important testimony from a company executive, this time from the President of Arrow. He stated that all Arrow Philadelphia traffic, destined for Allentown and related Pennsylvania areas, proceeded in a course from Philadelphia to Trenton, New Jersey, Clinton, New Jersey, Phillipsburg, New Jersey, back across the Delaware River and on the Pennsylvania side to Allentown. There are an average of three to four loads a night over these routes in each direction. Covering the same ground he said, "Between Philadelphia and Pennsylvania points, we move three or four loads a night northbound and I would say two or three a night southbound. So you would have an average of six to seven loads a night, I would say, out of a total on your entire system, let us say of around 90 loads." The business has increased to those figures from a trailer load a day between Philadelphia and other points in Pennsylvania in 1959. From the President's evidence it was fairly inferable that Arrow trailers carry a full load of goods for either its Philadelphia or Allentown terminal with no New Jersey stops to pick up or deliver goods.

Proofs applicable completely warranted the conclusion in this instance, as with Hudson, that Arrow's route was almost double Pennsylvania intrastate route mileage for the distance and for time of run.

Finally, as to the reason for this type of routing the President was asked the following questions and answered as appears:

"Q. In view of the fac. that in each of these instances your New Jersey route is longer and involves more driving time, why do you go that way? Why don't you go the short route directly through Pennsylvania?

A. It is the only authority that we have, granted from the ICC."

"N.T. 215.

Exam. Hanback: Let us assume you had freight moving from Philadelphia to Easton and Scranton only and there were no regulations.

Q. (By Mr. Graf) And no regulations.

A. If there was no regulation, I guess you would take whatever you figured to be the—whether it was the shortest route or the one with the lowest traffic, you would take the most convenient route if there was no regulation.

Q. Let us take another specific exampie, Philadelphia and Scranton, which way would you go?

A. I would probably go over the [Pennsylvania] turnpike."

Enough has been presented of the evidence to reveal the virtually undisputed pertinent situation of Hudson and Arrow. Neither one of them possesses, nor it would seem can they obtain, Pennsylvania intrastate certificates for routes between Philadelphia and Allentown, Scranton and adjacent Pennsylvania municipalities. Each of them therefore took two of their I.C.C. interstate certificates and tacked them together. By virtue of this move, they both claim they now have the right to carry Pennsylvania intrastate freight under their tacked interstate certificates by way of New Jersey. This is not a physically surreptitious action. The carriers are not really seeking to hide this from view. What they maintain is that the certificates are genuine and that the practice of tacking them, with the result before us, is valid. That result is engaging in

important Pennsylvania intrastate traffic under the aegis of their tacked I.C.C. certificates and so stultifying that state's control of its own intrastate, its local Pennsylvania motor carrier business.

The procedure followed by the Pennsylvania Public Utility Commission in bringing these situations to the Interstate Commerce Commission is entirely proper. The Supreme Court in Service Storage & Transfer Co., Inc. v. Virginia, 359 U.S. 171 (1959) has told us that the interpretation of the kind of problem before us is, in the first instance, for the Interstate Commerce Commission under § 204(c) of the Interstate Commerce Act, 49 U.S.C. § 304(c). And see Jones Motor Co. v. Pennsylvania Utility Commission, 361 U.S. 11, Pet. recon. and clar. den. 361 U.S. 904 (1959).

What the P.U.C. claimed to the Interstate Commerce Commission by its complaint was that in their actions outlined heretofore, Hudson and Arrow had abused their interstate certificates. In effect it alleged that the protested interstate routes of the truckers were nothing more than ingenious schemes to evade Commonwealth of Pennsylvania regulations of the intrastate motor carrier business concerned by running the vehicles under the tacked interstate certificates. In Service, see p. 176, there was uncontradicted evidence that the trucker's operation "* * * is not only practical, efficient and profitable, but also that the creation of this 'flow of traffic' is a timesaver to the shipper since there is less time lost waiting for the making up of a full truckload. It also claims a unique service for less-than-truckload shipments of central Virginians who ship commodities to southwest Virginia and Kentucky and who otherwise would suffer long delays on deliveries or would be obliged to ship by special truck at higher rates. While these considerations are not controlling, they throw light on petitioner's claim of bona fides." Against this was proof by Virginia, p. 175, "* * * that petitioner's

routes were circuitous and often long, sometimes exceeding twice the shortest possible route. However, it offered no direct evidence of bad faith on the part of petitioner in moving its traffic through Bluefield, West Virginia."

The Supreme Court made no attempt to decide the question of bad faith in Service because it was of the opinion and so held, p. 177: "It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action." The case was therefore reversed with the suggestion to the Commonwealth of Virginia that (p. 179): "If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204(c), supra, note 2, authorizes the filing of a 'complaint in writing to the Commission by any * * * State board * * * [that] any * * * carrier * * *' has abused its certificate." Generally regarding "bona fide operation" see McDonald v. Thompson, 305 U.S. 263, 266 (1938); Eichholz v. Public Service Commission of Missouri, 306 U.S. 268, 274, Pet. for rehrg. den. 306 U.S. 622 (1939).

In these actions Pennsylvania has followed the course charted by the Supreme Court. The latter in Service noted the finding of the Interstate Commerce Commission in its own Service declaratory opinion, 71 M.C.C. 304. The Commission there acted on the carrier's petition for a declaratory order interpreting its certificate. The Virginia Commission did not participate in that proceeding. The I.C.C. construed petitioner's certificate as authorizing Virginia to Virginia traffic routed through Bluefield, West Virginia. As to this, it states, as quoted in Service, Note 4, p. 178: "In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters, we are of the opinion

that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce." There was no occasion under the circumstances for the Supreme Court to pass upon that rule in its Service opinion. It is, however, squarely before us now and is in our judgment a sound, fair test for evaluating the operations of the carriers with which we are concerned.

From all of the evidence in these two suits the unavoidable conclusion is that the Hudson and Arrow routes involved are not logical and normal operations through their headquarters; that the use by Hudson and Arrow of their tacked on routes is a deliberate, calculated method employed by those carriers to avoid the unfavorable consequences to them of their intrastate Pennsylvania traffic coming within the rightful jurisdiction of the Utility Commission of that Commonwealth. Said evidence overwhelmingly points to those tacked on routes as artificial, contrived arrangements adopted by Hudson and Arrow in order to obtain desirable Pennsylvania intrastate business which would be otherwise unavailable to them. The record makes it very clear that we are here dealing not with bona fide transportation in interstate commerce but with a mystic maze route which is a more or less shrewd expedient designed solely to escape the control of the Pennsylvania Commission. In the full sense of the word, the operations are subterfuges.[1]

1. In accordance with the instruction of the Supreme Court in Service, supra, the Pennsylvania Public Utility Commission filed a complaint against Jones Motor Co., Inc. before the Interstate Commerce Commission. After hearing, the Commission Examiner, following the Service decision, found that the longer, circuitous routes utilized by Jones in and of themselves were not proof of bad faith or subterfuge. The Commission adopted the Examiner's statement of facts but concluded that the Jones transportation constituted a subterfuge. The Jones company filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking reversal of the Commission's decision. That case was heard in due course and has just been decided (June 4, 1963). The majority opinion held that the Commission's Order is not supported by substantial evidence,

It is strongly evident from the whole of the evidence that plaintiffs have abused their disputed certificates and

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that the evidence proved the interstate character of 108 shipments which were commingled with the 22 challenged intrastate shipments; that less than five per cent of plaintiff's business concerns such challenged transportation; that aside from testimony that Jones' routes were circuitous and somewhat long, no direct evidence of bad faith on the part of Jones was offered. The Court then concluded that "*Since the Commission, in its Order, bottomed its finding of bad faith solely upon the circuity of routing by Jones after agreeing with the Examiner in most respects, we must reject this unwarranted conclusion and adopt the Examiner's 'Corrected Report and Recommended Order'.*" (Emphasis supplied).

The Jones facts as presented in the majority opinion, are practically those noted in Service. The situation in Hudson and Arrow is radically different. In both these disputes, the Commission has justifiably found that the all important element of subterfuge in endeavoring to escape the impact of Pennsylvania supervision is the entire motivation of the routing via New Jersey. Also in Jones the Examiner found that, with regard to the circuitous routing, "It is not illogical, but in fact is more practical and feasible from the standpoint of operating efficiency and economy, for a carrier to include in the same vehicles with 108 shipments, which are admittedly in interstate commerce and moving over routes specified in its interstate certificates, 22 other shipments, over a period of four specified days, which, if defendant had held the appropriate authority, might technically have been moved by themselves over a shorter route." Under the particular facts, the Examiner said that it was not likely the carrier would have used a shorter route even if such had been available. He himself recognized the vital difference between the Jones facts and those in Hudson and Arrow. He stated:

> "*In the Hudson case division 1 found subterfuge because there was no logical reason for the circuitous routing via another State other than that the defendants therein were without appropriate intrastate authority, and in fact defendants therein admitted that, in the absence of any regulation of the challenged transportation, more direct routes would have been employed. Assuming that the division's findings in the Hudson case are not reversed after consideration of the pending petitions for reconsideration, the decision in that case does not form a basis for a holding of subterfuge in the instant proceeding.*" (Emphasis supplied).

As we have seen, the referred to findings of Division 1 in Hudson and Arrow were affirmed by the Commission.

From all of the above it is apparent that on substantially different facts found by the Interstate Commerce Commission Examiner, ac-

(Continued, p. 42a)

that the Interstate Commerce Commission was justified in so finding and in issuing its cease and desist orders. This was appropriate action in accordance with the opinion of the Supreme Court in Service, supra, and with the mandate of the National Transportation Act "to cooperate with the several States and the duly authorized officials thereof". 49 U.S.C. Preamble to the Interstate Commerce Act.

The complaints will be dismissed.

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cepted by the Commission and relied upon by the District Court, the routing in the Jones litigation was upheld. The issue before us as we have above detailed is not the one found by the Court to exist in Jones and there decided. Actually the Jones decision in effect strongly supports the rightness of our conclusion in these cases on their own particular facts.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 900

HIGHWAY EXPRESS LINES, INC., ET AL., APPELLANTS

v.

JONES MOTOR CO., INC.

No. 977

PENNSYLVANIA PUBLIC UTILITY COMMISSION, APPELLANT

v.

JONES MOTOR CO., INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

The United States and the Interstate Commerce Commission did not appeal from the decision below because, in their view, the issues were not sufficiently important to warrant seeking review in this Court.[1] We believe that the governing principles in this type

[1] While the Interstate Commerce Commission did file a notice of appeal, it dismissed its appeal from the decision below after this Court's affirmance in *Arrow Carrier Corp.*

726-831—64

of case have recently been established by *Arrow Carrier Corp.* v. *United States and Interstate Commerce Commission*, 375 U.S. 452. In *Arrow*, this Court affirmed, *per curiam*, the decision of the district court, 219 F. Supp. 43 (D. N.J.), holding that the Commission is empowered to issue cease and desist orders prohibiting motor carriers possessing interstate certificates of public convenience and necessity from conducting their operations under these certificates as a subterfuge to avoid State regulation of *intrastate* commerce. *Arrow* also held that abuse of the *interstate* certificates was shown by the circuity of the carrier's routes (connecting Pennsylvania points through New Jersey), which were not "logical and normal" operations but apparently employed to avoid State regulation.

As we pointed out in our motion to affirm filed in *Arrow*, it seems clear that there is no conflict between that case and the instant one as to the extent of the Commission's power. The only issue here is the application of the proper standards to the particular evidence of the case.

Jones Motor Co., Inc. ("Jones") is primarily an interstate carrier and does not possess any authority from the Pennsylvania Public Utility Commission to operate between the Philadelphia and Allentown, Pa. areas. Jones has two interstate certificates issued by the Interstate Commerce Commission, which authorize it to operate between Philadelphia, Pa. and New York, N.Y., and between Elizabeth, N.J. and Allentown, Pa. By tacking these operations at Clinton,

N.J., a service point common to both certificates, Jones is able to provide service between Philadelphia and Allentown where it maintains terminals (J.S. PUC 48–49).[2]

The district court and the Commission found that Jones used these interstate certificates as the basis for soliciting traffic which had its origin and destination in Pennsylvania (J.S. PUC 49). During May and June of 1957, Jones carried 22 Pennsylvania shipments, together with 108 shipments "admittedly interstate in character," between Philadelphia and Allentown, Pa. over routes passing through the State of New Jersey. The district court found that the "shipments involved moved over these routes at night and there were no pickups, changing of freight from one vehicle to another, or any business or terminal stops in New Jersey. This was a terminal to terminal operation by Jones" between points in Pennsylvania (J.S. PUC 48, 49). Jones does not maintain any terminals in New Jersey.

The Commission, on the complaint of the Pennsylvania Public Utility Commission, had issued an order to Jones to cease and desist from using its federal interstate certificates to transport goods between Philadel-

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[2] "J.S. PUC" refers to the jurisdictional statement filed by the Pennsylvania Public Utility Commission, No. 977, this Term.

Significantly the route used by Jones, *i.e.* between Philadelphia and Allentown, Pa. via Clinton, N.J., is almost identical to the route used by Arrow Carrier Corporation. The route between Philadelphia and Allentown, Pa. via New Jersey is substantially longer and consumes materially more driving time than the direct routes lying wholly within Pennsylvania (J.S. PUC 51).

phia and Allentown, Pennsylvania through Clinton, New Jersey (J.S. PUC 87). The district court reversed this order because it ruled that the record failed to disclose substantial evidence to support the Commission's finding of subterfuge on the part of Jones. The court found that it was logical and normal for Jones to carry shipments from Philadelphia and Allentown by way of Clinton, New Jersey. This conclusion was based upon the court's finding that Jones carried little traffic between these points and that economically it made more sense for it to commingle these intrastate shipments with interstate shipments than to ship them separately on a wholly intrastate route (J.S. PUC 62–63).[3]

The district court's rationale is that federal interstate certificates may be used to carry limited amounts of intrastate traffic on a circuitous interstate route, if these shipments are commingled with interstate shipments because they are too few to support an independent intrastate service. This would lead to the anomalous result of permitting a carrier to transport small amounts of intrastate shipments but prohibiting it from carrying such shipments if his business improves to the point where he would have enough to carry full intrastate truckloads. Apart from diffi-

[3] However, the majority opinion below overlooks the fact that the 22 shipments were merely representative of the type of operations conducted by Jones. These were not to be considered as the total number of Pennsylvania shipments by Jones, nor could these 22 shipments be used to establish any valid percentage relationship of the total number of shipments transported by Jones. (J.S. PUC 77–78, 80–81.)

culties of administration inherent in this approach, we suggest that a determination whether a carrier is using his federal certificate to avoid State regulation should not be dependent on the volume of intrastate shipments it is successful in attracting. On the contrary, we believe that the Commission was warranted in concluding that the operations of Jones were a subterfuge since it found (a) that there had been circuitous routing and (b) that there was no showing by Jones that it performed any necessary service or operation on these shipments when they were transported through New Jersey. See *Service Transfer Co.* v. *Virginia*, 359 U.S. 171. However, as indicated above, the reasons for plenary consideration do not appear compelling in the light of this Court's disposition of the *Arrow* litigation.

Respectfully submitted.

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Nos. 800, 977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

HIGHWAY EXPRESS LINES, INC., ET AL., *Appellants*

v.

JONES MOTOR CO., INC.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Appellant*

v.

JONES MOTOR CO., INC.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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MOTION TO AFFIRM OF JONES MOTOR CO., INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 900, 977

HIGHWAY EXPRESS LINES, INC., ET AL., *Appellants*

v.

JONES MOTOR CO., INC.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Appellant*

v.

JONES MOTOR CO., INC.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

MOTION TO AFFIRM OF JONES MOTOR CO., INC.

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, Jones Motor Co., Inc. moves that the judgment of the District Court be affirmed.

HISTORY OF THE CASE

The factual determination presented by this proceeding is before your Honorable Court for the second time. A brief chronological history is essential to an understanding of the issues.

On August 5, 1957, a Complaint against Jones Motor Co., Inc. was initiated by Pennsylvania Public Utility Commission before itself and docketed at Complaint Docket C. 16813. The Pennsylvania Commission heard its own Complaint, sustained it by its own decision and issued a Cease and Desist Order.

Jones then appealed to the Superior Court of Pennsylvania, which sustained the Pennsylvania Commission in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 188 Pa. Superior Ct. 449, 149 A.2d 491. Jones then filed its Petition for Allowance of Appeal with the Supreme Court of Pennsylvania at 123A, Miscellaneous Docket. Allocatur was refused.

Jones next filed its Petition for Writ of Certiorari with your Honorable Court and your Honorable Court granted the Petition and reversed the judgment of the Superior Court of Pennsylvania in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 11.

Thereafter, the Pennsylvania Commission filed a Petition for Reconsideration and Clarification, praying your Honorable Court "to file a clarifying opinion or memorandum order expressly stating that the judgment of the Court below was reversed on jurisdictional grounds without regard to the merits of the controversy in the instant cause". A like Petition containing a similar prayer was filed on behalf of Intervenors in that proceeding (Appellants in Number 900 herein).

Your Honorable Court denied these Petitions for Reconsideration in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 904.

The Pennsylvania Commission then filed a Complaint with the Interstate Commerce Commission docketed at MC-C-2732, naming Jones Motor Co., Inc. as Defendant. The Complaint averred that operations by Jones in transporting property between certain Pennsylvania points over routes lying partly in New Jersey were beyond the scope of its certificated authority and requested the issuance of a cease and desist order.

Of importance here, that Complaint was predicated upon the identical shipments of the identical property on the identical days from the identical consignors to the identical consignees involved in the prior proceeding determined by your Honorable Court in 361 U.S. 11 and 361 U.S. 904. By reason thereof, Jones Motor Co., Inc. filed with the Interstate Commerce Commission a Motion to Dismiss the Complaint, predicating the Motion upon the Doctrine of Res Adjudicata and on the merits. The Motion was denied and the matter was heard before an Examiner. The Motion to Dismiss was renewed at the hearing.

The Hearing Examiner in his Corrected Report and Recommended Order found that Jones Motor Co., Inc. was performing authorized transportation between points in Pennsylvania through points in New Jersey, recommended the dismissal of the Complaint on the merits, but denied the Motion to Dismiss.

After Exceptions, the Interstate Commerce Commission, through its Division 1, adopted the Findings of Fact of the Examiner, but reversed, concluding that the transportation performed by Jones constituted a subterfuge and was not authorized. A Petition for Reconsideration and Oral Argument filed by Jones was denied, whereupon Jones filed its Complaint in the United States District Court for the Eastern District of Pennsylvania.

The Court below heard argument and reversed the Interstate Commerce Commission. *Jones Motor Co., Inc. v. United States and Interstate Commerce Commission*, 218

F. Supp. 133 (1963). Upon Petition, the Court below heard reargument and after reargument, affirmed its prior Order of reversal. *Jones Motor Co., Inc.* v. *United States and Interstate Commerce Commission*, 223 F. Supp. 835 (1963).

Appeals were filed by Highway Express Lines, Inc., Modern Transfer Co., Inc. and the Pennsylvania Commission. The United States did not appeal and the appeal of the Interstate Commerce Commission was dismissed on that Commission's Petition.

Despite the withdrawal of Appeal and the failure of the United States to Appeal, there has been filed a "Memorandum on Behalf of the United States and the Interstate Commerce Commission".

STATEMENT OF FACTS

The facts as presented before the Interstate Commerce Commission are not in dispute, a matter upon which both the Hearing Examiner and the Court below commented.

The following stipulations of fact appear of record:

> "it is admitted by Respondent that the transportation referred to in Paragraphs 4 to 25, inclusive, of the Complaint was performed by Respondents. It is agreed that the routes employed were as follows: From Philadelphia, Pennsylvania, over U. S. 1 to Trenton, New Jersey; thence over New Jersey 69 to Clinton, New Jersey; thence over U. S. 22 to Allentown, Pennsylvania. This same route was operated in the reverse direction as well.
>
> It is further agreed that: (1) Clinton, New Jersey, is within 35 miles of Princeton, New Jersey; (2) points in the Allentown area, except Easton, Pennsylvania, and Bethlehem, Pennsylvania, mentioned in this Complaint are all within 25 miles of Allentown and were served as off-route points via the same route set forth above; (3) Easton, Pennsylvania, and Bethlehem, Pennsylvania, were served as intermediate points on

In contrast, Jones Motor Co., Inc. presented the following unrefuted evidence to establish the lawful nature of its operation under its valid interstate Certificates:

1. Its base Certificate at MC-4963 (Exhibit 3) and its Certificate at MC-4963, Sub 7 (Exhibit 4).

2. Testimony indicating the portions of the base Certificate and the Certificate at Sub 7 relied upon to support its contention that the grants of authority properly were tacked (N.T. 62-66).

3. The Report of the Commission by Division 4 at MC-F-4955, which authorized the acquisition by Jones Motor Co., Inc. of its present Sub 7 authority and which *specifically authorized the combination* of the Sub 7 authority with the other interstate authorities of Jones in the following words:

> "Upon consummation of the purchase, Jones Motor Co., Inc., will be entitled to operate under the operating rights granted in No. MC-108161, *which rights are herein authorized to be unified with rights otherwise confirmed in it* and to be embraced in a certificate in its name, with duplications eliminated;" (Emphasis supplied) (Exhibit 5; Sheet 7).

4. That all of the shipments referred to in Paragraphs 4 to 25 inclusive of the Complaint were handled over the route set forth in the stipulation hereinbefore mentioned in reliance upon the tacking of authorities contained in Exhibits 3 and 4 (N.T. 67) and specifically authorized by Exhibit 5 as quoted above.

5. The routes in question are published as interstate routes in Middle Atlantic Conference Tariff 16 (N.T. 69), and the rates charged and collected also are published in appropriate interstate tariffs (Exhibit 6).

6. Jones Motor Co., Inc. operates terminals at Philadelphia and Allentown, Pennsylvania (N.T. 69). During the period of its operation of the Sub 7 authority under

temporary authority and for a year and a half thereafter, during which time the Sub 7 authority was operated as an integral part of the Jones operation, a terminal was also maintained at Clinton, New Jersey (N.T. 69-70-71).

7. When the Clinton terminal was first used, it performed breakbulk functions, serving shippers in the North Jersey territory (N.T. 71). Subsequently, Jones discovered that the breakbulk operations could best be handled out of the Allentown terminal and it accordingly closed the terminal at Clinton, New Jersey. The route, however, still operates through Clinton (N.T. 71).

8. The operations over the route in question initially commenced on July 30, 1951 by virtue of temporary authority granted by the Interstate Commerce Commission at MC-F-4955 (N.T. 72), and were continued upon issuance of the Certificate at Sub 7, pursuant to the *express authority to combine* its routes as quoted above (Exhibit 5).

9. Jones, prior to, at the time of the Complaint, and since, has maintained solicitors at both the Allentown and the Philadelphia terminals and also had a solicitor in Trenton, New Jersey (N.T. 76). At the time covered by this Complaint, these solicitors solicited traffic for freight forwarders, for steamships, for export, for movement over the routes of Jones Motor, as well as for movement in connection with other lines for which through routes and joint rates are published (N.T. 76-77).

10. Jones presented Exhibits setting forth all the shipments mentioned in the Complaint and also detailing the other traffic moving in conjunction therewith on the same vehicles (Exhibits 7, 8, 9 and 10). These Exhibits reveal traffic handled for the same consignors and the same consignees, whose shipments were challenged by the Complaint (N.T. 97). All of this traffic destined to points intermediate between Philadelphia and Allentown was delivered by peddle runs in the daytime operating out of

the respective Allentown and Philadelphia terminals (N.T. 101; 99-100-101).

11. The transportation referred to in Paragraphs 4 to 25 inclusive of the Complaint all took place at night (N.T. 83). Since it is a normal terminal-to-terminal operation, there were neither pickups nor deliveries made en route on those trips (N.T. 84).

12. In contrast, Jones Motor Co., Inc. presented as Exhibit 12 a traffic study showing pro numbers, dates, origins, destinations, descriptions and weight of certain traffic moved during the same period of time covered by the Complaint on which deliveries were made while the vehicles were en route, as well as deliveries made from the respective Allentown and Philadelphia terminals (Exhibit 12; N.T. 108). This traffic also moved over the challenged route, in whole or in part (N.T. 114).

13. At no time did Jones Motor Co., Inc. make any effort to conceal its mode of operation over the considered route (N.T. 105). On the contrary, it followed its authorized routes (N.T. 67), published those routes in a proper routing guide (N.T. 69), published proper rates and charged and collected them (Exhibit 6) and handled the traffic concerned in conjunction with other interstate traffic (Exhibits 7, 8, 9 and 10).

The Hearing Examiner, who observed the witnesses and their demeanor, concluded from these facts that Jones Motor Co., Inc. possessed valid Certificates, properly combined them, properly conducted its operation over the challenged routes, had logical reasons so to do and that the Pennsylvania Commission failed to establish any subterfuge or bad faith. As the Court below indicated in both its decisions, there were logical, practical and feasible reasons from the standpoint of operating efficiency and economy for Jones to transport the challenged shipments over the route in question.

Significantly, the Interstate Commerce Commission adopted the facts found by the Examiner; admitted the

validity of the Jones' Certificates; admitted that the Certificates were properly combined, but reversed the Examiner.

The Court below commented upon these factors as follows:

> "It is interesting to note that the Commission in its Report at p. 612 adopted the Examiner's statement of the facts, and rulings on evidence, such as, his allowance of certain exhibits which proved the interstate character of the other 108 shipments commingled with the challenged 22 shipments from the same consignors destined for Pennsylvania points. Division 1 also agreed with the Examiner's finding that the tacking by Jones of its two interstate authorities was lawful and proper. (p. 613)" (218 F. Supp. 133, 137)
>
> * * *
>
> "The only testimony offered to prove bad faith or subterfuge were the statements by officers of the intervenors, Modern Transfer Co. and Highway Express Lines, as to the use of Pennsylvania routes by their companies because they were more logical and practical for *their* operation. Also, there was testimony by a Mr. Duffy who had a conversation with one of Jones' drivers who stated that he had been making the trip for approximately five years, five nights per week over the routes covered by the stipulation mentioned above. An investigator for the P. U. C. gave testimony which the Examiner regarded as merely cumulative to Mr. Duffy's testimony and unrelated to any data mentioned in the Complaint.
>
> "Apart from this testimony offered by the P. U. C. to support its position that Jones' routes were circuitous, and somewhat long, no direct evidence of bad faith on the part of Jones was offered by the P. U. C. *Service Transfer Co.* v. *Virginia*, supra, P. 175.[6]

[6] The Supreme Court dealt with this identical situation with these words:

> "* * * Aside from the testimony of highway officers as to the actual shipments, none of which is disputed, the Commonwealth's evidence consisted solely of maps substantiating its position that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. However, it offered no direct evidence of bad faith on the part of petitioner in moving its traffic through Bluefield, West Virginia.' (At Page 137).

"Conversely, Jones was specifically authorized to combine its Certificates in proceedings at MC-F-4955 by these words:

> 'Upon consummation of the purchase, Jones Motor Co., Inc., will be entitled to Operate under the operating rights granted in No. MC-108161, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate in its name, with duplications eliminated * * *'[7]

"Jones also proved that it provided a complete and economical transportation service to its customers by Exhibits 7, 8, 9 and 10, which show that the same consignors are served at the same time on traffic going to other points and that all of this traffic can be picked up at one time. By this nightly terminal to terminal road run Jones can assure its customers morning delivery via local peddle runs which would be handled in the daytime because the businesses then would be open to receive freight (Ex. 12)." (218 F. Supp. 133, 137-138).

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[7] Modern Transfer Co., Intervenor herein, was a protestant to the aequisition by Jones of this Sub 7 authority (Ex. 5)." (At Page 138).

ARGUMENT

Res Adjudicata Requires That the Appeals Be Dismissed

Throughout this proceeding Jones Motor Co., Inc. has urged the dismissal of the Complaint on the basis of Res Adjudicata. It filed a Motion to Dismiss on that ground and the Motion was renewed and pressed at each step of the proceeding.

The identical shipments, without exception, not merely similar shipments, were before your Honorable Court in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 11 and 361 U.S. 904. As previously stated, that other proceeding arose out of a Complaint by the same Pennsylvania Commission involving the identical traffic. The Pennsylvania Commission, after hearing its

own Complaint, issued a Cease and Desist Order which was appealed by Jones to the Superior Court of Pennsylvania. The Superior Court of Pennsylvania affirmed the Order of the Pennsylvania Commission, and on Petition for Allowance of Appeal filed by Jones with the Supreme Court of Pennsylvania, allocatur was refused.

Upon Petition for Certiorari, your Honorable Court reversed in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 11, citing *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, 359 U.S. 171.

The Pennsylvania Commission then filed its Petition for Reconsideration and Clarification, praying your Honorable Court "to file a clarifying opinion or memorandum order expressly stating that the judgment of the Court below was reversed on jurisdictional grounds, without regard to the merits of the controversy in the instant cause". Your Honorable Court denied this and like Petitions filed by Intervenors in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 904.

In *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra, the reversal by your Honorable Court revoked a fine which had been imposed. In the first *Jones* case, the action of your Honorable Court nullified a Cease and Desist Order, which most assuredly would not have been procedural or jurisdictional in its effect if not reversed. In the second *Jones* case, though expressly petitioned to declare the first *Jones* case to be jurisdictional merely, your Honorable Court ruled adversely to the Pennsylvania Commission.

Since neither the *Service Storage* case, supra, nor the two *Jones* cases were jurisdictional in their effect, the Doctrine of Res Adjudicata applies. This principle was succinctly set forth in *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1 (1897), as follows:

> "The general principle announced in numerous cases is that a right, question, or fact *distinctly put in issue*

> *and directly determined* by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of *all matters properly put in issue and actually determined by them.*" (p. 48-49) (emphasis supplied)

The Challenged Transportation Is Interstate Commerce

The challenged transportation "between places in the same state through another state" constitutes interstate commerce, pursuant to Act of Congress and the decided cases thereunder.

The Congress of the United States has defined interstate commerce in Section 203(a)(10) of Part II of the Interstate Commerce Act (Title 49 U.S.C. Section 303(a)(10)) as follows:

> "The term 'interstate commerce' means commerce between any place in a State and any place in another State or *between places in the same State through another State*, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water". (Emphasis supplied)

This Section of the Act has been interpreted time after time.

The Interstate Commerce Commission gave recognition to the Congressional definition in *Dixie Freight Lines, Inc.*,

Common Carrier Application, 24 M.C.C. 780, wherein a question arose as to whether transportation from Atlanta, Georgia to Fort Benning, Georgia via Opelika, Alabama constituted interstate commerce. It decided that it did, the Commission stated:

> ". . . there can be no question but that property transported from Atlanta to Fort Benning via Opelika moves in interstate commerce. This is seen from the definition of that term in Section 203(a)(10) of the Motor Carrier Act of 1935, which reads as follows:" (Act cited) (24 M.C.C. 780, 782).

As recently as August 1, 1961, the Interstate Commerce Commission granted authority to a number of carriers to transport cement from producing origins in a specific state to destinations in the same state. *H. C. Gabler, Inc., Extension—Cement from Maryland and Pennsylvania Counties*, 86 M.C.C. 477. One of the carriers which secured such authority is Modern Transfer Co., Inc., one of the Appellants in Number 900. In the *Gabler* case, this carrier secured a Certificate at MC-118836 to transport cement from a producing plant at Northampton, Pennsylvania, to points in a number of states, specifically including Pennsylvania (86 M.C.C. 447, at 516).

The proceedings involving Atlantic Freight Lines, Inc., which concerned the identical statutory definition here at issue, is also worthy of note. There, as here, the Pennsylvania Commission instituted a Complaint before itself against the carrier, averring that transportation between two Pennsylvania points via an interstate certificated route traversing another state constituted intrastate commerce. After the Pennsylvania Commission had sustained its own Complaint, the Superior Court of Pennsylvania, on Appeal, sustained the Pennsylvania Commission.[1] The Supreme

[1] *Atlantic Freight Lines, Inc. v. Pennsylvania Public Utility Commission*, 163 Pa. Superior Ct., 215, 6 A. 2d 589.

Court of Pennsylvania refused allocatur and your Honorable Court denied certiorari. Atlantic Freight Lines, Inc. then filed a Petition for Declaratory Order with the Interstate Commerce Commission, which Commission took jurisdiction and found for Atlantic Freight Lines, Inc. *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 M.C.C. 175.

The Atlantic Freight Lines litigation did not terminate with the Declaratory Order proceeding. The Pennsylvania Commission instituted an equity action in the Court of Common Pleas of Dauphin County, Pennsylvania, at Equity Docket 20008, Commonwealth Docket 2672.[2] In that proceeding, the Pennsylvania Commission entered into a Consent Decree, whereunder Atlantic Freight Lines, Inc. was permitted to operate between two Pennsylvania points via interstate routes of movement through another state.

Your Honorable Court has construed transporation between points in the same state via another state to be interstate commerce. In *Central Greyhound Lines* v. *Mealey*, 334 U.S. 563 (1948), a question arose to whether a New York State Tax applied with respect to operations beginning and ending at a point in New York State but which involved routes also traversing Pennsylvania. This Court stated:

> "It is too late in the day to deny that transportation which leaves the state and enters another state is commerce among the several states simply because the points from and to are in the same state" (334 U.S. 655-656).

In *Missouri Pacific Railroad Co.* v. *Roy Stroud*, 267 U.S. 404 (1925), the carrier operated two routes between Oxly, Missouri and St. Louis, Missouri. The first route was entirely located within the State of Missouri while the second

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[2] *Pennsylvania Public Utility Commission* v. *Atlantic Freight Lines, Inc.*, E.D. 20008, C.D. 267.

traversed a portion of Missouri and a portion of Illinois. A shipper sued the Missouri Pacific for damages under a Missouri Statute for loss resulting to it from delay in furnishing freight cars. In the course of the testimony, it developed that the shipper's traffic moved over the route traversing both Missouri and Illinois.

In its decision, this Court called attention to the penalties provided in the Missouri Statute and those in the Interstate Commerce Act, with reference to unreasonable preference or advantage and added "It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. Transportation from Oxly to St. Louis over the route partly within and partly outside of Missouri is interstate commerce" (267 U.S. 404, 408).

Hanley v. *Kansas City Southern Railway Company*, 187 U.S. 617 (1903), involved an effort by the State of Arkansas to fix the rates on traffic moving between points in Arkansas through what was then Indian Territory. The goods were shipped from Fort Smith, Arkansas for some 52 miles in Arkansas and nearly 64 miles in Indian Territory. The charge imposed by the railroad was higher than that prescribed by the Arkansas Commission. Mr. Justice Holmes, writing the Opinion of the Court, reviewed numerous cases, some of which declare the interstate nature of transportation between points in one state through another state and some of which make similar holdings with respect to the nature of commerce for tax purposes, and quoted Mr. Justice Field in *Pacific Coast Steamship Co.* v. *Railroad Commissioners*, 9 Sawyer, 253, as follows:

> "To bring the transportation within the control of the State as part of its domestic commerce the subject transported must be within the entire voyage under the exclusive jurisdiction of the State" (187 U.S. 617, 620).

Cornell Steamboat Co. v. *United States*, 321 U.S. 634 (1944), held that transportation by a towing operation from one port in New York to another port in the same State is regulated transportation, subject to the jurisdiction of the Interstate Commerce Commission, even when the operation traversed merely the border water separating New York and New Jersey and also conducted for part of the distance within the water boundaries of the second state. The statute governing water carriage is less specific in its definitions than that governing motor carriage. Section 302(h) of the Interstate Commerce Act (49 U.S.C. 902(h)) provides:

> "(h) The term 'transportation' includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, including the receipt, delivery, elevation, transfer in transit, refrigeration or icing, ventilation, storage, and handling of property transported or the interchange thereof with any other agency of transportation".

Paragraph (i) of Section 302 of the Act (49 U.S.C. 902(i)) reads, in pertinent part, as follows:

> "(i) The term 'interstate or foreign transportation' or 'transportation in interstate or foreign commerce', as used in this part, means transportation of persons or property—
>
> "(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States; * * *".

In holding that the transportation in question is interstate, and subject to regulation by the Interstate Commerce Commission, although under statutory language less specific than that in the case at bar, this Court said:

> "Parts I, II, and IV of the Interstate Commerce Act, relating respectively to regulation of rail carriers,

> motor cariers, and freight forwarders, explicitly or by judicial interpretation cover all shipments which pass through the territory of two or more states even though both terminal points are in the same state. And so if railroads or truckers should use tugs for the same purposes and over the same route as Cornell the movements would be interstate under the Act and subject to regulation by the Commission; and apparently the same is true of freight forwarders. From the language of Part III of the Act, its history, and its general purpose, we conclude that the Commission and District Court correctly decided Cornell's transportation through New York and New Jersey waters also is subject to regulation by the Commission" (321 U.S. 634, 640-641).

In *Western Union Telegraph Company* v. *Speight*, 254 U.S. 17, a suit was brought in the North Carolina courts against the telegraph company to recover damages for mental suffering caused by an error in delivering a telegraphic message. The message originated at Greenville, North Carolina, was destined to Rosemary, North Carolina, but was transmitted via Roanoke and Norfolk, Virginia. The jury found that the message was sent into Virginia from North Carolina for the purpose of fraudulently evading liability under North Carolina law. Nevertheless, the presiding Judge set aside the verdict as a matter of law and ordered a non-suit. On Appeal, the North Carolina Supreme Court directed that judgment be entered on the verdict.

In reversing, this Court stated: "The transmission of a message through two states is interstate commerce as a matter of fact. *Hanley* v. *Kansas City Southern Railway Co.*, 187 U.S. 617".

The most recent Opinion by this Court in interpreting the Section here in question was *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra. The history of that proceeding merits attention.

The Virginia Commission instituted a Complaint proceeding against *Service Storage and Transfer Co., Inc.* and after hearing, fined that carrier $5,000.00 for transporting ten shipments which the Virginia Commission contended were intrastate in nature and, hence, in violation of Chapter 12, Title 56 of the Code of Virginia. The Virginia Court of Appeals sustained the Virginia Commission on Appeal but reduced the fine. *Service Storage & Transfer Co.* v. *Virginia*, 199 Va. 797; 102 S.E. 2d 399.

The Virginia Commission in its Order (in Case Number 13074 decided June 9, 1956) indicated that *Service Storage* was transporting property, inter alia, between Roanoke and Wytheville, Virginia by way of Bluefield, West Virginia. This decision found the distance between Roanoke and Wytheville, Virginia by the shortest route, to be 80 miles and the distance by way of Bluefield, West Virginia, as traveled by *Service Storage*, to be 160 miles, or twice the distance. The Supreme Court of Appeals of Virginia made similar mention of this same transportation (199 Va. 797).

Both the Virginia Commission and the Virginia Appellate Court relied upon the question of circuity and the fact that the normal route would lie wholly within Virginia.

Service Storage and Transfer Co. filed a Petition for Declaratory Order with the Interstate Commerce Commission, at MC, 30471, which was decided in favor of *Service Storage* by Division 1 on March 29, 1957. In the course of the decision, Division 1 found the routes employed not unduly circuitous.

In the interim, *Service Storage* appealed the decision of the Virginia Court of Appeals to this Court, which granted Certiorari and found as facts the following:

1. The shipments originated at Virginia points and were destined to Virginia points but were routed through Bluefield, West Virginia (at Page 172).

2. *Service Storage* conducted its operations under Certificates issued by the Interstate Commerce Commission, combining two of these Certificates (at Pages 173, 174).

3. The Virginia State Corporation Commission had not issued any Certificate to *Service Storage* authorizing any intrastate carriage (at Page 174).

4. Virginia contended that subterfuge was to be found by virtue of the circuitous and unnecessarily long routes, often exceeding twice the shortest possible routes (at Page 175).

5. Virginia offered no direct evidence of bad faith on the part of *Service Storage* (at Page 175).

6. *Service Storage* offered evidence of its operations under its interstate Certificates as proof of the bona fides of its operations (at Pages 175, 176).

This Court reversed the judgment of the Court of Appeals of Virginia (and necessarily of the Virginia State Corporation Commission) and found for *Service Storage and Transfer Co., Inc.*, stating: "The Certificate on its face covers the whole operation" (359 U.S. 171, 177).

The prior *Jones* proceedings at 361 U.S. 11 and 361 U.S. 904, were decided on the strength of *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra.

Appellants Did Not Meet the Burden of Proof of Subterfuge

Though the Complaint specifically raised as an issue a subterfuge on the part of Jones Motor Co., Inc., no direct evidence of bad faith such as deceit, concealment, fraud, deception or artifice was presented. Moreover, in the absence of any element of subterfuge, the Commission has found it to exist.

The Court below, on the contrary, in its initial Opinion, recognized this fact when it found:

> "The only testimony offered to prove bad faith or subterfuge were the statements by officers of the inter-

venors, Modern Transfer Co. and Highway Express Lines, as to the use of Pennsylvania routes by their companies because they were more logical and practical for *their* operation. Also, there was testimony by a Mr. Duffy who had a conversation with one of Jones' drivers who stated that he had been making the trip for approximately five years, five nights per week over the routes covered by the stipulation mentioned above. An investigator for the P.U.C. gave testimony which the Examiner regarded as merely cumulative to Mr. Duffy's testimony and unrelated to any data mentioned in the Complaint.

"Apart from this testimony offered by the P.U.C. to support its position that Jones' routes were circuitous, and somewhat long, no direct evidence of bad faith on the part of Jones was offered by the P.U.C. *Service Transfer Co.* v. *Virginia*, supra, p. 175. (Footnote omitted) (218 F. Supp. 133, 137)

* * *

"The burden of proof on the subterfuge question is placed upon the P.U.C., not on Jones which admittedly is operating under validly combined Certificates. Since the Commission, in its Order, bottomed its findings of bad faith solely upon the circuity of routing by Jones after agreeing with the Examiner in most respects, we must reject this unwarranted conclusion and adopt the Examiner's 'Corrected Report and Recommended Order'." (At Page 138)

In its Opinion and Order on reargument, the Court below re-emphasized that the Interstate Commerce Commission's finding of subterfuge was not sustained by the evidence, when it stated: "The basis of our prior opinion and order was that the record failed to disclose substantial evidence to support the Commission's finding of subterfuge on the part of Jones" (223 F. Supp. 835, 836). The Court below then went on to indicate: ". . . we find no evidence of bad faith in the record of this proceeding" (At Page 836).

The District Court thus recognized that where subterfuge is at issue, the burden of proof thereof is imposed

upon the proponent of the proposition that subterfuge exists. The cases are in accord.

The Circuit Court of Appeals of the 9th Circuit in a cause involving purchase of corporate stock had before it a case where subterfuge was expressly alleged, as in the present case, but also like the present case, there was no affirmative evidence thereof. The Circuit Court of Appeals in reversing the lower court said:

> "There is nothing in the pleadings and certainly nothing in the evidence to support the contention that Appellant tried to keep anything from the knowledge of the Appellee or tried to get him to sign the letter by unfair means" *Los Angeles Fisheries* v. *Crook*, 47 F. 2d 1031, 1035.

Also of relevance here is *Camden Trust Company* v. *Gidney*, 301 F. 2d 521 (1962), cert. den. 369 U.S. 886, in which "manifest subterfuge" was alleged to have been practiced in arranging the opening of a banking facility where a competing bank was already in operation.

The Camden Trust Company, with principal office in Camden, N. J., had, since 1953, maintained a branch bank at Erlton, in Delaware Township, N. J. Delaware Township was evidently a desirable site for a bank and in 1960 the Haddonfield National Bank, Haddonfield, N. J., sought authority to locate its main office here, while retaining as a branch its Haddonfield office only two miles away. It was refused by Gidney, Comptroller of the Treasury. Thereafter, the Directors of Haddonfield National filed application for the incorporation of a new national bank in Delaware Township. Appellant, Camden Trust, objected, and when it appeared that the Comptroller would approve the new facility, action was filed in court by Camden Trust. Upon dismissal of the Complaint, Plaintiff appealed.

New Jersey law, as pertinent, provides that no bank shall establish or maintain a branch office which is located out-

U. S. 22 between Allentown, Pennsylvania, and Clinton, New Jersey; (4) Chester, Pennsylvania, is within the Philadelphia Commercial Zone; (5) Oaks, Pennsylvania, was served as a free astray from Philadelphia over route first set forth above; (6) Hatboro, Pennsylvania, was served via an unnumbered route between Hatboro and Philadelphia, Pennsylvania, and thence to destination over the routes first set forth above" (N.T. 16-17).

The free astray described in the foregoing stipulation was defined as a misplaced or lost shipment which subsequently appeared at the Philadelphia dock and was moved over the routes in question (N.T. 18).

Jones also stipulated that the transportation averred in Paragraphs 4 to 25 inclusive of the Complaint was not performed under any certificate issued by the Pennsylvania Commission (N.T. 19).

The distances and driving times over the routes in question and over other routes lying wholly within Pennsylvania also were stipulated, as follows:

"It is stipulated and agreed between counsel that if the witness now on the stand had testified as to distances and driving times between the Jones Motor Company, Inc., terminal in Philadelphia and Jones Motor Company, Inc., terminal at Allentown, the following would apply: Over the routes traversed by Jones as mentioned in a previous stipulation the distance would be 96.2 miles, and the driving time three hours. Between the same points over U. S. Highway 309 lying wholly within Pennsylvania the distance would be 55 miles and the driving time 2 hours 5 minutes.

Over the Pennsylvania Turnpike between the same points, wholly within Pennsylvania, the distance would be 74.9 miles and the driving time one hour fifty minutes.

In so stipulating it is understood that Respondent does not agree that the distances and times over U. S. 309 and the Pennsylvania Turnpike are relevant to this proceeding" (N.T. 21-22).

The Pennsylvania Commission presented only the following evidence:

1. Mr. Duffy, who testified concerning his conversation with one of Jones' drivers during October, 1960. Mr. Duffy indicated that the driver informed him that he had been making the trip for approximately five years, five nights per week over the routes covered by the stipulation mentioned above (N.T. 29-30).

2. Witness John Staub's testimony was originally stricken (N.T. 40-41-42), but the Examiner, in his recommended Order, reinstated it in its entirety (Sheet 6). As the Examiner pointed out, the testimony was not related to any date mentioned in the Complaint (N.T. 38; Sheet 6). Otherwise, his testimony was merely cumulative to that given by Witness Duffy, a fact on which the Examiner commented in reversing his ruling (Sheet 6).

3. Witness Wetmore of Modern Transfer Co. (N.T. 43) testified as to his company's Pennsylvania intrastate operating authority and the location of its terminals. He added that U. S. Route 309, lying wholly within Pennsylvania was the route used by his company and was "the most practical and economical" *for his company to use* (N.T. 52), but that his company did use the Pennsylvania Turnpike in instances of bad weather (N.T. 55).

4. Witness Imhof of Highway Express Lines, Inc. (N.T. 55) identified his company's intrastate operating authority (N.T. 56), located his company's terminals and was of the opinion that U. S. 309, used by his company, was the most logical and economical route *for his company to use* (N.T. 58).

The foregoing was the only direct evidence offered in support of the Complaint. There was no evidence presented by Pennsylvania Commission with relation to any administrative or regulatory difficulties, violations, irregularities or bad faith on the part of Jones.

side the municipality in which its principal office is located. Federal Law is so drafted that the Comptroller of the Treasury, in granting approval for the opening of a branch banking facility in a city, town, or village, must act conformably with applicable state law on the subject. It was argued by Camden Trust that since under State law no other state bank could establish a branch bank in Delaware Township, no New Jersey Bank could establish a branch there. Accordingly, it became important to determine whether what the directors of Haddonfield National as individuals sought to have approved was the establishment of a branch bank of Haddonfield National, or the establishment of an entirely new bank. The court found it was the latter.

The record shows that the directors of Haddonfield National, after denial by the Comptroller of the Treasury of the bank's application to locate in Delaware Township, acting as individuals, invited its shareholders by letter to subscribe to shares in a new bank. The letter stated, *inter alia*, that the new bank, to be called Delaware Valley National Bank, would be an affiliate of Haddonfield National Bank and that its affairs would be conducted by the same management and under the same policies as the Haddonfield National Bank.

The application of the Haddonfield directors under the facts described above was termed by Appellant Camden Trust to be "on its face a manifest subterfuge to circumvent the provisions and purposes of the National Bank Act by attempting to introduce into Delaware Township a banking facility that will for all practical purposes constitute a branch facility of the Haddonfield National Bank". Approval by the Comptroller would, under these circumstances, it said, be beyond the Comptroller's authority and an abuse of his discretion.

The Court of Appeals for the District of Columbia Circuit, whose action, through denial of certiorari by this

Court, was not disturbed, affirmed the action of the District Court granting judgment for the Comptroller.

The Court rejected the argument of subterfuge saying, among other things:

> "Whatever weight is to be given to the appellant's legal argument, it is difficult to think of the Haddonfield directors' action as a 'subterfuge', at least in an invidious sense. On the contrary, the preliminary proceedings seem to have been open and notorious. Perhaps on that account the 'subterfuge' was alleged to be 'manifest'. The president of the Haddonfield National Bank on its letterhead notified all of its shareholders of the plan and the objective which the directors sought. Appellant protested orally and in writing to the Comptroller. The latter and the New Jersey Bank Commissioner corresponded concerning the project. It fairly may be said that we perceive nothing arcane or wrongfully covert in the effort . . ." (391 F. 2d at 523).

Western Union Telegraph Co. v. *Speight*, supra, also dealt with the question of bad faith to the extent that said case dealt with the motive of the telegraph company in transmitting its message from a North Carolina origin to a North Carolina destination via points in Virginia. Therein, it was stated at page 19:

> "The burden was on the plaintiff to make out her case. Moreover, the motive would not have made the business intrastate".

Finally, in *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra, this Court emphasized that Virginia had presented no direct evidence of bad faith, in these words:

> "It contends that petitioner's circuitous and unnecessarily long routes were a mere subterfuge to escape intrastate regulation and evade its jurisdiction. Aside from the testimony of highway officers as to the actual shipments, none of which is disputed, the Common-

> wealth's evidence consisted soley of maps substantiating its position that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. *However, it offered no direct evidence of bad faith on the part of petitioner* in moving its traffic through Bluefield, West Virginia". (Emphasis ours) (359 U.S. 171, 175)

The Questions Raised by the Jurisdictional Statements Are Unsubstantial

The Pennsylvania Commission contends that the questions presented are substantial in that the decision of the Court below conflicts with *Arrow Carrier Corporation* v. *United States*, 375 U.S. 452; that the Court below made findings at odds with the Commission; and that the Court below erred in not remanding the case to the Commission for further proceedings. Appellants Highway and Modern contend that the majority opinion embarrasses the Pennsylvania Commission's regulatory efforts; misinterprets the significance of the Examiner's Report; and restricts relief to a revocation proceeding..

These contentions lack merit.

The United States District Court for the District of New Jersey specifically distinguished the Opinion of the Court below in this matter. The Interstate Commerce Commission in its Motion to Affirm in *Arrow Carrier Corporation* v. *United States*, supra, stated at page 9:

> "The issue in *Jones* was whether the facts there supported the Commission's finding of subterfuge. On rehearing, the *Jones* court emphasized that its reversal of the Commission was based upon its evaluation of the evidence (App., infra, pp. 11-12). The district court in the instant case properly distinguished *Jones* on its facts (J.S. 12a-13a, fn. 1)".

The Court below properly pointed out that the Hearing Examiner made Findings of Fact which the Interstate Commerce Commission adopted. The Court agreed with

these Findings and concluded that those Findings did not constitute any direct evidence of bad faith. The Court below found logical reasons for the Jones' operation and found beyond dispute that the burden of proof of subterfuge had not been met.

The third contention of the Pennsylvania Commission with respect to remission of the record upon its request, is equally lacking in merit. The issue before the Court below was whether subterfuge had been established. The Court concluded it had not.

The contentions raised by Highway and Modern are unsubstantial. There is nothing in this record with respect to any administrative or regulatory burdens or difficulties experienced by the Pennsylvania Commission and none should be injected into this case by way of argument.

As previously stated, the Examiner in his Report made Findings of Fact which were adopted by the Commission and recognized as valid by the Court below.

The third contention of Appellants Highway and Modern is also not well taken. The instant proceeding hinged upon the burden of proof of subterfuge. The Court found that that burden had not been met.

CONCLUSION

The question presented to the Court is Res Adjudicata. The transportation in question is clearly interstate commerce by specific statutory terms and has been so construed by the Courts. Moreover, the operation has been conducted pursuant to certificates issued by the Interstate Commerce Commission and is wholly without subterfuge. At no time did the Interstate Commerce Commission cite any Section of the Interstate Commerce Act which Appellee is said to have violated. The questions presented by the Appeal are not substantial and do not require the plenary consideration of this Court. With this view, the United States and the

Interstate Commerce Commission agree in their Memorandum filed herein, wherein they say: "The reasons for plenary consideration do not appear compelling in the light of this court's disposition of the Arrow litigation" (Page 5). Appellee requests this Court to affirm the Opinion of the Court below.

Respectfully submitted,

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